Union of India Vs Alembic Glass Industries Ltd.

Court: Karnataka High Court

Date of Decision: Dec. 14, 1990

Acts Referred: Central Excise Act, 1944 â€" Section 11 B, 2, 3, 4, 4 (1)
Central Excise Rules, 1944 â€" Rule 8 (1)

Citation: (1991) 34 ECC 131 : (1992) 61 ELT 193 : (1991) ILR (Kar) 1749

Hon'ble Judges: P.K. Shyamasundar, J; M. Rama Jois, J; Bisheshwar Prasad Singh, J

Bench: Full Bench

Advocate: Shri Ashok Harnahalli, C.G.S.C, for the Appellant; Shri Dushyant Dave and M. R. Naik, for the Respondent

Judgement

Rama Jois, J.
In this Writ Appeal, the following three questions of law are referred for the opinion of the Full Bench :

(1) Whether it is correct to hold that as per the 2nd part of the explanation to Section 4(4)(d)(ii) of the Act only the effective rate of duty can be

deducted from the normal price and not that element of duty which is refunded by the department, the benefit of which has not been passed on to

the buyer ?

(2) Whether as per clause (ii) of the 2nd part of the explanation to 4(4)(d)(ii) of the Act, the refunded amount can be included in the normal price,

in cases where the higher rate of duty is initially assessed and collected from the customers and subsequently on a proper computation of value as

per Section 4, the value of goods gets reduced resulting in refund of duty, the benefit of such refunds is not passed on to buyer ?

(3) Where full duty is levied on exempted goods and subsequently as a result of applying the exemption notification, the excess duty is refunded,

whether as per clause (i) of the 2nd part of the explanation to 4(4)(d)(ii) of the Act, such excess amount (i.e., the difference between the full

amount of duty and the duty payable at reduced rate) the benefit of which is not passed on to buyers becomes part of the normal price ?

2. Brief facts of the case, to the extent necessary for answering the questions referred for our opinion, are as follows :

The respondent - Alembic Glass Industries Limited, was engaged in the manufacture and sale of glass and glass-wares at its factory situated in

White Field near Bangalore, During the year 1975, the respondent filed the price-lists of their products before the Superintendent of Central

Excise, Bangalore, for the purpose of enabling the Excise Department to levy the excise duty leviable under the provisions of the Central Excises

and Salt Act, 1944 (""the Act"" for short). In the price lists the respondent stated that cartons and packing materials used for packing the glass and

glass-ware articles, manufactured and sold by the respondent, were being supplied by the buyers and therefore the cost of such packing materials

were not includible in the assessable value of the goods for the purpose of levy of excise duty. The price-lists as submitted by the respondent was

provisionally accepted by the Superintendent. The Assistant Collector of Central Excise, however, had issued a notice to the respondent calling

upon it to show cause as to why the provisional approval accorded to the price lists by the Superintendent should not be withdrawn and the cost of

packing materials should not be included in the assessable value. After the issue of the show cause notice, the respondent presented Writ Petition

No. 5995 of 1975, inter alia, challenging the legality of the proposal to include the value of the packing material in the assessable value of the

goods and to levy excise duty on the total value so arrived at. The Division Bench of this Court allowed the said writ petition by its order dated 23-

1-1985 [Reported as Alembic Glass Industries Limited Vs. Union of India and Others, . The Division Bench held that as according to Section 4(4)

(d)(i) of the Act, value of packing material which is of a durable nature and is returnable by the buyer, has to be excluded, in finding out the

assessable value of the goods for the purpose of levy of excise duty, there was no logic or reason to include the value of the packing material

supplied by the buyers themselves. On this view of the matter, the show cause notice was set aside and the Division Bench also held that the

respondent was entitled to make an application for refund of excise duty, to which the respondent would become entitled to consequent on the

quashing of the show cause notice on the ground that the value of packing material supplied by the buyers could not be included in the assessable

value of the goods for purposes of levy of excise duty under the Act. The relevant portion of the Judgment is paragraph 18. It reads :-

18. On the above discussion, it follows that the impugned show cause notice is liable to be quashed. With this, it follows that any application to be

made by the petitioner for refund of excise duty, if any, paid has necessarily to be examined and decided by the authority in accordance with law.

19. In the light of our above discussion, we make the following orders and directions :

(i) We dismiss this writ petition insofar as it challenges the validity of Section 4(4)(d)(i);

(ii) We quash the impugned show cause notice issued by the Assistant Collector (Exhibit-B).

After the above order, the respondent made an application before the Assistant Collector of Central Excise - the second appellant, claiming refund

of Rs. 42,78,947.07 which was the amount of excise duty paid by the respondent on the value of the packing material during the period

commencing from 2-12-1975 to 14-5-1985. There is no dispute that the amount of excise duty paid by the respondent during the aforesaid period

was, as stated by the respondent. The 2nd appellant, however, granted a refund of Rs. 27,89,502.00. He rejected the claim for refund of Rs.

14,80,663.00. The basis on which the Assistant Collector granted only a partial refund was that during the period commencing from 2-12-1975 to

14-5-1985 as disclosed by the bills under which the goods manufactured by the respondent were sold, the respondent had collected excise duty

to the extend of Rs. 42,78,947.07 and as the respondent failed to answer a specific query made by the 2nd appellant as to whether the respondent

was going to refund the amount to the respective buyers and if so to furnish the list of persons to whom the amount would be refunded, the said

amount had to be treated as part of the value of the goods and consequently the Department was entitled to levy excise duty on the said amount.

On the said basis, the 2nd appellant levied excise duty. In other words, according to the 2nd appellant though the amount of Rs. 42,78,947.07 had

been included in the respective bills as excise duty on the value of packing material, in view of the decision of this Court in W.P. 5995/1975

Alembic Glass Industries Limited Vs. Union of India and Others,] the said amount ceased to be excise duty and therefore unless the said amount

was refunded to the parties concerned, the said amount would become part of the wholesale price for which the goods were sold by the

respondent and consequently liable for excise duty, at the rate which was in force from time to time during the period commencing from 2-12-

1975 to 14-5-1985. There is no dispute that during this period originally the excise duty on glass and glass-wares was 30%, it was increased to

35%, which was in force for some time and thereafter it was increased to 40%. The 2nd appellant included the excise duty which had been

collected by the respondent from its buyers and which ceased to be excise duty as a result of the decision of this Court, in the value of the goods,

for the reason that the respondent was not refunding the amount to the buyers concerned and levied excise duty on the said amount at the

prevailing rates. The amount of Rs. 14,80,663/- which the 2nd appellant refused to refund, is the excise duty which the 2nd appellant levied on the

amount of Rs. 42,78,947.07 having due regard to the rates of excise duty prevailing during the different periods between 2-12-1975 and 14-5-

1985. Questioning the legality of the order of the 2nd appellant the respondent filed W.P. No. 4334/1989. This writ petition was allowed.

[reported as Alembic Glass Industries Ltd. Vs. Union of India, The present appeal by the appellants is against that order.

3. The learned Judge who decided W.P. No. 4334/1989 Alembic Glass Industries Ltd. Vs. Union of India, allowed the said writ petition and

directed the refund of amount of Rs. 14,80,663/- on the ground that the 2nd appellant could not refuse to refund the entire amount of excise duty

paid on the value of the packing material as no such excise duty was leviable as held in W.P. No. 5995 of 1975 Alembic Glass Industries Limited

Vs. Union of India and Others, even though the respondent had not passed on the benefit to the buyers.

4. In the appeal, it has been the contention of the appellant that the method of ascertaining the value in relation to excisable goods is clearly laid

down in Section 4(4)(d)(ii) of the Act, and accordingly the computation has been made by the 2nd appellant strictly according to that provision, in

that as the amount of excise duty on packing material charged and collected from the customers was no longer excise duty in view of the Judgment

of this Court in W.P. No. 5995 of 1975 Alembic Glass Industries Limited Vs. Union of India and Others, and the respondent was not refunding

that amount to the customers, the same had to be treated as part of the value of the goods and when so treated Section 3 of the Act got attracted,

and the appellants had the power and duty to collect excise duty on that amount and that is what exactly has been done, as a result of which Rs.

14,80,663/- was the excise duty payable on Rs. 42,78,947.07 and therefore deducting the excise duty the balance has been refunded.

5. Per contra, it has been the contention of the respondent that Section 4(4)(d)(ii) was not at all relevant for effecting the refund u/s 11B of the Act

read with the order of this Court in W.P. No. 5995/1975 Alembic Glass Industries Limited Vs. Union of India and Others, and that a Division

Bench decision of this Court in Mangalore Chemicals and Fertilizers Ltd. and Others Vs. Assistant Collector of Central Excise, Mangalore and

Others, supports the stand of the respondent and the view taken by the 2nd appellant was contrary to the said decision. It is in view of this

contention, the Division Bench having doubted the correctness of the interpretation of Section 4(4)(d)(ii) in the case of Mangalore Chemicals and

Fertilizers Ltd. and Others Vs. Assistant Collector of Central Excise, Mangalore and Others, has referred the three questions for the opinion of the

Full Bench.

6. In order to answer the questions referred for our opinion, it is necessary to make a brief reference to the relevant provisions of the Act. Section

2 is the charging section. According to the said Section, duties of excise shall be levied and collected on all excisable goods at the rates set forth in

the Schedule to the Central Excise Tariff Act as in force. Section 4(1) of the Act prescribes the method of valuation of goods for the purpose of

levy of excise duty. Clause d(i) and clause d(ii) of sub-section (4) of Section 4, together with the explanation inserted by Act 14/82, with effect

from 1-10-1975 reads :

(d) ''value'' in relation to any excisable goods -

(i) where the goods are delivered at the time of removal in a packed condition, includes that cost of such packing except the cost of the packing

which is of a durable nature and is returnable by the buyer to the assess.

Explanation. - In this sub-clause, ''packing'' means the wrapper, container, bobbin, pirn, spool, reel or warp beam or any other thing in which or on

which the excisable goods are wrapped, contained or wound;

(ii) does not include the amount of the duty of excise, sales tax and other taxes, if any, payable on such goods and, subject to such rules as may be

made, the trade discount (such discount not being refundable on any account whatsoever) allowed in accordance with the normal practice of the

wholesale trade at the time of removal in respect of such goods sold or contracted for sale.

Explanation. - For the purposes of this sub-clause, the amount of the duty of excise payable on any excisable goods shall be sum total of -

(a) the effective duty of excise payable on such goods under this Act; and

(b) the aggregate of the effective duties of excise payable under other Central Acts, if any, providing for the levy of duties of excise on such goods,

and the effective duty of excise on such goods under each Act referred to in clause (a) or clause (b) shall be

(i) in a case where a notification or order providing for any exemption (not being an exemption for giving credit with respect to, or reduction of

duty of excise under such Act on such goods equal to, any duty of excise under such Act, or the additional duty u/s 3 of the Customs Tariff Act,

1975 (51 of 1975), already paid on the raw material or component parts used in the production or manufacture of such goods) from the duty of

excise under such Act is for the time being in force, the duty of excise computed with reference to the rate specified in such Act in respect of such

goods as reduced so as to give full and complete effect to such exemption; and

(ii) in any other case, the duty of excise computed with reference to the rate specified in such Act in respect of such goods.

(e) ''wholesale trade'' means sales to dealers, industrial consumers, Government, local authorities and other buyers, who or which purchase their

requirement otherwise than in retail.

A reading of clause (d)(ii) together with explanation indicates that the value in relation to excisable goods does not include the cost of packing

which is of a durable nature and is returnable by the buyer to the assessee. It does not include the amount of duty of excise, sales tax and other

taxes payable on such goods. According to the explanation, the excise duty for the purpose of clause (d) comprises not only of the duty payable

on such good under the Act but also the aggregate of the effective duties of excise payable under other central enactments also, if any and the

expression ""effective duty"" means actual duty payable taking note of exemption from payment of duty or reduced rate of excise duty, as the case

may be, if any, on the goods concerned.

7. Shri Ashok, the learned Standing Counsel for the Central Government, submitted that in a given case, in finding out as to what is the value of the

goods for the purpose of levy of excise duty u/s 3 of the Act, out of the wholesale price for which the goods are sold by a manufacturer to a buyer,

only the amounts specified in clause (d)(ii), namely, the sales tax and other taxes, if any, paid on such goods which are included in the bill and also

the excise duty payable under the Act or any other enactment actually payable on the price of the goods specified has to be excluded and the

balance after deducting those items from the wholesale price would constitute the value of the excisable goods for the purpose of charging excise

duty u/s 3 of the Act. Explaining as to how it has been actually worked out in the present case, the learned Counsel submitted as follows :

In every one of the bills the respondent had included the excise duty at the prescribed rates payable not only on the price of the goods charged by

the respondent to its customers but had also included the amount of excise duty excise duty charged on the value of the packing material.

Consequent on the decision of this Court in W.P. No. 5995/1975 (sic) Alembic Glass Industries Limited Vs. Union of India and Others, the

amount of excise duty charged and collected by the respondent from the buyers, lost the character of excise duty. If the respondent had agreed to

refund the said amount to the concerned buyers, there would have been no other alternative for the 2nd appellant to refund the entire amount of

excise duty which the respondent had charged and collected from the buyers and had paid it to the Central Government, as in that event that part

of the amount could not have become the component of the value of the goods. But admittedly the respondent had not and was not agreeable to

refund the amount of excise duty collected even after it ceased to be the excise duty in view of the decision of this Court in W.P. No. 5995/1975

Alembic Glass Industries Limited Vs. Union of India and Others, and in view of this, the said amount not being one of the items specified in Section

4(4)(d)(ii) of the Act which are required to be deducted out of the wholesale price charged by the respondent to the buyers concerned to ascertain

the value of the goods chargeable to excise duty u/s 3, it had to be added to the value of the goods and the appellants were entitled to collect

excise duty on that part of the amount and that was what has actually been done by the 2nd appellant.

8. In support of his contention that in arriving at the value of the value of the goods chargeable to excise duty under the Act, no other item can be

deducted, the learned Counsel relied on the judgment of the Supreme Court in the case of Union of India (UOI) and Others Vs. Bombay Tyre

International Ltd. and Others, The relevant portion of the judgment reads :-

17. As we have said, it was open to the Legislature to specify the measure for assessing the levy. The Legislature has done so. In both the old

Section 4 and the new Section 4, the price charged by the manufacturer on a sale by him represents the measure. Price and sale are related

concepts, and price has a definite connotation. The "value" of the excisable article has to be computed with reference to the price charged by the

manufacturer, the computation being made in accordance with the terms of Section 4.

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49. We now proceed to the question whether any post-manufacturing expenses are deductible from the price when determining the "value" of the

excisable article. The old Section 4 provided by the Explanation thereto that in determining the price of any article under that Section no abatement

or deduction would 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. The new Section 4 provides by sub-section (2) that where the price of

excisable goods for delivery at the place of removal is not known and the value is determined with reference to the price for delivery at a place

other than the place of removal, the cost of transportation from the place of removal to the place of delivery has to be excluded from such price.

The new Section 4 also contains sub-section (4)(d)(ii) which declares that the expression "value" in relation to any excisable goods, does not

include the amount of the duty of excise, sales tax and other taxes, if any, payable on such goods and, subject to such rules as may be made, the

trade discount (such discount not being refundable on any account whatsoever) allowed in accordance with the normal practice of the wholesale

trade at the time of removal in respect of such goods sold or contracted for sale. Now these are clear provisions expressly providing for deduction,

from the price, of certain items of certain items of expenditure.

The learned Counsel pointed out that in view of the interpretation of the provisions by the Supreme Court as above, the method adopted by the

2nd appellant in computing the amount to be refunded to the respondent was correct, for, out of the wholesale price charged in the bills by the

respondent no item other than those specified in Section 4(4)(d)(ii) of the Act could be deducted. Therefore he submitted that all the three

questions referred for the opinion of the Full Bench should be answered in favour of the appellants. As regards the Division Bench decision of this

Court in Mangalore Chemicals and Fertilizers Ltd. and Others Vs. Assistant Collector of Central Excise, Mangalore and Others, in which, on

interpretation of Section 4(4)(d)(ii) of the Act it was held that no excise duty was leviable on that part of the amount of excise duty collected in

excess from the buyers without passing on the benefits of exemption or reduction in the rate of excise duty, the learned Counsel submitted the

interpretation was erroneous.

9. Shri Dushyant Dave, the learned Counsel appearing for the respondent, however, contended that the amount of excise duty which the

respondent had charged and collected from its buyers and paid to the Government under protest, cannot at all be added to the value of the goods,

after the decision of this Court holding that excise duty was not leviable on the value of the packing material. In support of his contention, he relied

on the judgment of Division Bench of this Court in Mangalore Chemicals and Fertilizers Ltd. and Others Vs. Assistant Collector of Central Excise,

Mangalore and Others, . He also contended that for ordering refund u/s 11B of the Act, Section 4(4)(d)(ii) was wholly irrelevant and that when

this Court had held that no excise duty was leviable on the value of the packing material supplied by the buyers the only course open to the 2nd

appellant was to refund the amount of excise duty paid on the value of the packing materials.

10. In order to appreciate the rival submissions made on the interpretation of Section 4(4)(d)(ii), it is necessary to state precisely as to what

actually has been done by the 2nd appellant. For this purpose, it is sufficient to refer to one of the invoices under which the goods manufactured by

the respondent were sold. The relevant portion of the invoice dated 30-8-1086 reads :

Description Quantity Rate per Amount

Thousand Rs. Ps.

Rs. Ps.

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(1) (2) (3) (4) (5)

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1. 50 Gms. pure Coffee Jars 28000 740.00 20,720.00

(70 cartions x 40 pcs.)

2. Basic Excise Duty @ 40% 8,288.00

29,008.00

3. B.E.D. on Cartons supplied by 2,046.80

customers @ Rs. 182.75 per 1000

bottles paid under protest @ 40%. ----------

31,054.80

4. Central Sales Tax @ 4% 1,242.20

Total 32,297.00

Rs. 32,297.00 (Rupees Thirty two thousand Two hundred Ninety seven

only).

As can be seen from the above bill, the prices of the goods sold was specified as Rs. 20,720/-. Excise duty at the rate of 40%, which was the then

prevailing rate, which came to Rs. 8,288/- was also charged in the Bill. In addition to that, the respondent charged excise duty of Rs. 2,046.80 on

the value of the packing material. With this, the amount came to Rs. 31,054.80. The central sales tax at the rate of 4% was also added, which

came to Rs. 1,242.20. The total wholesale price for which the goods were sold under that invoice came to Rs. 32,297.00. Now, according to the

judgment of this Court in W.P. No. 5995/1975 Alembic Glass Industries Limited Vs. Union of India and Others, no excise duty was leviable on

the value of the packing material. In view of the said judgment, Rs. 2,046.80 incorporated in the bill lost the character of excise duty. If that

amount were to be refunded by the respondent to the buyer, undoubtedly the appellants had no other alternative than to refund the said amount, as

admittedly the respondent had paid that amount to the appellants as excise duty. It is for this reason the 2nd appellant addressed a letter dated 26-

11-1987 (Annexure-E) to the respondent. Relevant portion of the letter reads :-

2 ""Please refer to your refund claim for Rs. 42,78,947.07 filed on 6-2-1985. While you submitted the above claim you did not enclose the duty

paying documents which were necessary to be enclosed for the purpose of finalisation of the claim. However, as you are aware, action is being

taken by the Superintendent of Central Excise, Whitefield Range, to verify the claim with the duty paying documents which are in your custody.

2. In the meantime, I would request you to intimate whether you are passing on the benefit of the fund as claimed by you, to the customers and in

case you are doing so, you may please state the names of the parties to whom you are passing on the benefit, the amount which is being passed on

and as to the mode of transfer of the amount to the respective parties.

Admittedly the respondent did not reply. Before us also the learned Counsel for the respondent stated that there was no question of the respondent

refunding the excise duty on packing material included in the wholesale price to the buyer concerned. Even so the contention of the respondent is

as the excise duty on the value of packing material was collected without authority of law, and was paid under protest, during the pendency of Writ

Petition No. 5995 of 1975, with the allowing of the writ petition, the amount so collected had to be refunded and the appellants have no authority

to refuse to refund and such action would also contravene the order of this Court in Writ Petition No. 5995/1975. The argument, thought at first

sight, appears to be attractive, on a closer scrutiny is devoid of merit. If the appellants had taken the stand that they refuse to refund the excise duty

paid on the value of the packing material as it is not being refunded, the contention of the respondent would have been unexceptionable. But the

stand of the appellants is that as the excise duty on packing material had been collected by the respondent from its buyers and the said amount

ceased to be excise duty in view of the order of this Court in W.P. No. 5995/75 and as the respondent was not refunding the said amount to the

buyers, that amount has to be included in the sale price and on that amount excise duty at the prevailing rate was leviable and payable. Therefore,

in respect of the bill extracted above excise duty at the rate of 40% on Rs. 2,048.80 was charged u/s 3 of the Act and the balance was refunded.

Same method was adopted in respect of each of the bills. The question for our consideration is, whether the above method adopted is in

conformity with Section 4(4)(d)(ii) of the Act as contended by the learned Counsel for the appellants or not as contended by the learned Counsel

for the respondent. The learned Counsel for the respondent in support of his construction of Section 4(4)(d)(ii) of the Act relied on the judgment of

this court in Mangalore Chemicals and Fertilizers Ltd. and Others Vs. Assistant Collector of Central Excise, Mangalore and Others, It does

support his contention. Learned Counsel for the appellants contends that the interpretation of Section 4(4)(d)(ii) in Mangalore Chemicals and

Fertilizers Ltd. and Others Vs. Assistant Collector of Central Excise, Mangalore and Others, was erroneous.

11. The material facts of the case in Mangalore Chemicals and Fertilizers Ltd. and Others Vs. Assistant Collector of Central Excise, Mangalore

and Others, were these : The petitioner therein was engaged in the manufacture of caustic soda. It was liable to excise duty being a goods specified

at Item 14-B of the First Schedule to the Act. In exercise of the power under sub-rule (1) of Rule 8 of the Central Excise Rules, 1944, the Central

Government issued a notification dated 16-6-1976 under which it granted exemption from payment of excise duty on Caustic Soda, subject to

certain conditions. Thereafter, a trade notice dated 21-3-1977 was issued by the Collector of Central Excise. The relevant portion of the notice

reads :-

Subject : Central Excise - Scheme of Excise Duty - Relief to encourage higher production - Reg.

Attention of the trade is invited to Government of India Notification No. 198/76-C.E., dated 16-6-1976, communicated in this Office Trade

Notification No. 173/76, dated 21-5-1976, wherein the Government of India had brought into force a scheme in June, 1976 under which

manufacturers of specified commodities would be entitled to 25% reduction in the Central Excise duty leviable on clearance of their manufactures

which were in excess of the clearances in the "Base Period" subject to prescribed conditions. The question has arisen whether the duty relief can

be retained by the manufacturer and Government wish to clarify that it is for the manufacturer to decide whether the benefit of the duty exemption

earned by him should be retained by him or not. However, it may be noted that in the event the manufacturer not passing on the benefit in whole or

in part to the buyer, the assessable value of the goods will have to be adjusted accordingly and the duty computed on the assessable value so

adjusted. The purport of the above notice was that in cases where the manufacturer has not passed on the benefit of exemption to the buyers, the

assessable value of the goods has to be increased by including therein an amount equal to the amount retained by the manufacturer, out of the

benefit secured by way of exemption without passing on the said benefit to the buyer. After the above notice was issued Section 4(4)(d)(ii) of the

Act was amended with retrospective effect from 1-4-1975 by Section 14 of the Finance Act. 1982. According to the appellants the amendment

was clarificatory in nature and was intended to give effect to the principle incorporated in the aforesaid Trade notice, to avoid any challenge to the

adoption of the method set out in the notice on the ground that it was beyond the competence of the Collector, for, it expanded the scope of

Section 4 of the Act. In the case of Mangalore Chemicals and Fertilizers Ltd. and Others Vs. Assistant Collector of Central Excise, Mangalore

and Others, the constitutional validity of Section 4(4)(d)(ii) as amended as also the legality of the trade notice were challenged. The Division Bench

upheld the constitutional validity of Section 4(4)(d)(ii) of the Act, but declared the Trade notice invalid. Relevant portion of the judgment explaining

the scope of Section 4(4)(d)(ii) and the view expressed regarding the legality of levy of excise duty on the amount equal to the exemption secured

under notification issued under Rule 8(4) of the rules which is not passed on to the buyers, reads :

29. In determining the ''value'' or the ''assessable value'' Section 4 of the Act, the first part of the explanation declares that the amount of duty of

excise on any excisable goods shall be the sum total of the effective duty of excise on such goods chargeable under the Act or the aggregate of

excise duty payable on such goods under any other Central Act. The effective duty or the duty actually chargeable or payable only should be

exempted or excluded. What is chargeable is only the real or actual excise duty chargeable under the Act or other Central Acts thereto on such

goods. This is the first general import of the explanation and has no relevance to the other part of the explanation relating to cases of exemptions

granted by Government with which we are primarily concerned, which however is closely interlinked with the first. The second part of the

explanation provides that in computing the effective or actual excise duty referred to in clauses (a) and (b) to which exemption have been granted

by Government, then so much of duty that is actually paid by the assessee shall alone be computed. In other words, only the duty as reduced and

actually paid on the manufactured goods should be excluded in determining the assessable value of such manufactured goods. In determining the

assessable value of goods, that are not governed by exemptions either partial or whole, the duty chargeable under the Act had to be excluded. But

in cases of exemptions only the actual or real duty paid by the assessee shall alone be excluded and not the duty hypothetically chargeable under

the Act. The point may be illustrated thus : We shall take that on a manufactured goods ''A'', the duty chargeable under the Act is Rs. 100/- but

Government by a notification had reduced the same by Rs. 50/- and thus the assessee pays Rs. 50/- on such a manufactured goods. In determining

the assessable value of goods ''A'', the assessing authority is required to exclude only Rs. 50/- actually paid or payable by the assessee and not Rs.

100/- chargeable under the Act. All that the explanation provides is to regulate the assessable value on the realities of the situations and not on any

notional basis. We are of the view that this explanation does no more than this.

30. We must also remember that exemptions are generally granted to encourage industry or achieve higher manufacture of goods by industry. But

that does not mean, Government cannot impose a condition to the effect that industry should pass on the benefit to the Consumer as it had done in

some exemptions, which had not been done by Government in the notification we are concerned.

31. What emerges from the above is that the question of adding back any duty that is not passed on to the consumer or paying any additional duty

on the same on the ground that the same had not been passed to consumers as if that was a requirement of the explanation is wholly misconceived

and is not sound.

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35. What emerges from the above discussion is that in determining the assessable value of manufactured goods governed by exemptions granted

by Government either partial or whole, only that amount of duty actually paid or payable by such manufacturer should be excluded and the benefit

of such exemption cannot be denied on the ground that the extent of such exemption either in whole or in part had not been passed to the

consumer. We need hardly say that assessments, levies, recoveries and refunds as against and from the petitioners from 1-10-1975 had to be

regulated on this basis and not on the basis of the trade notice issued by the Collector.

12. As far as the view expressed in paragraph 29 regarding the scope of Section 4(4)(d)(ii) of the Act is concerned, there is no controversy. The

view is, while computing the assessable value of the goods liable to excise duty, in respect of which reduction or exemption is granted, out of the

wholesale price charged, by a manufacturer to the buyer, only the actual amount of excise duty payable has to be deducted and no deduction of an

amount calculated at the rate of excise duty payable in the absence of exemption or reduction, can be granted. Similarly there is no controversy

about paragraph 30 in which, the Division Bench said that it was competent for the Government while granting exemption from or reduction in

excise duty, to impose a condition that exemption or reduction could be availed if only the benefit is passed on to the consumers. But the

controversy is about the view expressed at paragraph 31 in which the Division Bench said, that it was not the requirement of the explanation that if

the benefit of exemption is not passed on to the consumers excise duty is leviable on that part of the amount not passed on.

13. We proceed to analyse the correctness of the view taking the very illustration given by the Division Bench at paragraph 29.

(1) If on manufacture of goods "A" the excise duty payable is Rs. 100/-, but the Government has reduced the duty by Rs. 50/- in determining the

assessable value, whether Rs. 100/- should be deducted or Rs. 50/- should be deducted is the question. The Division Bench held only Rs. 50/-

should be deducted out of the price charged to the buyer to ascertain the assessable value and not Rs. 100/- on the ground that it was the normal

amount of excise duty payable in the absence of reduction for, amended Section 4(4)(d)(ii) provides for deduction of only ""effective excise duty"",

payable i.e., the excise duty actually payable in view of the reduction of excise duty. This position is correct. It is not disputed by the appellants''

counsel also.

(ii) (a) If in the same case, the Manufacturer, in spite of reduction of excise duty from Rs. 100/- to Rs. 50/-, had included excise duty of Rs. 100/-

in the Bill, instead of Rs. 50/-, even then according to para 29, in ascertaining the value for the purpose of excise duty only Rs. 50/- should be

deducted and not Rs. 100/-. This position is also not disputed by the appellants.

(b) But in such a case, as the position would be that the Manufacturer would have collected Rs. 100/- from the buyer, as excise duty though only

Rs. 50/- is payable as excise duty he would be pocketing the balance i.e. Rs. 50/-. The precise question raised is, does Section 4(4)(d)(ii) enable

the inclusion of that Rs. 50/- which the manufacturer has charged to the buyer, in the assessable value of the goods as it is not one of the deductible

items under that provision and to collect excise duty at the prescribed rate on that amount of Rs. 50/- as contended by the appellants ? The view

expressed by the Division Bench at paragraph 31 read with paragraph 35, Mangalore Chemicals and Fertilizers Ltd. and Others Vs. Assistant

Collector of Central Excise, Mangalore and Others, to the effect that the view of the department that explanation to Section 4(4)(d)(ii) authorises

such a course was misconceived debars the excise department from, levying excise duty on that amount. It is on these paragraphs the learned

Counsel for the respondent relies as supporting his contention. The Division Bench which referred the question for the opinion of the Full Bench

has expressed doubt about the correctness of the view on the interpretation of Section 4(4)(d)(ii) of the Act expressed at paragraphs 31 and 35 of

the judgment in Mangalore Chemicals and Fertilizers Ltd. and Others Vs. Assistant Collector of Central Excise, Mangalore and Others, .

14. On a careful consideration of the matter, we are of the view that the clear meaning of Section 4(4)(d)(ii) as amended with effect from 1-4-

1975 is :

(1) That for ascertaining the value of the goods, for the purpose of levy of excise duty, only the amount of actual duty payable alone should be

deducted from the total wholesale price charged and collected from the buyers. Therefore, in cases of reduction in the rate of excise duty, the

deduction permissible is the amount of excise duty payable at the reduced rate, and in the case of total exemption from payment of excise duty

there is no question of deduction at all. In other words, in both types of cases the manufacturer cannot claim deduction at the rate of excise duty

prescribed. To this extent, the view expressed by the Division Bench in Mangalore Chemicals and Fertilizers Ltd. and Others Vs. Assistant

Collector of Central Excise, Mangalore and Others, is correct and we respectfully agree.

(2) But if in a given case, notwithstanding the grant of exemption from payment of excise duty or reduction of excise duty it is found that a

manufacturer has actually charged and collected excise duty by not passing on the benefit of exemption or reduction to the buyers, as the amount

so collected does not fall under any of the deductible items specified in Section 4(4)(d)(ii) the same has to be added to the value for purposes of

levy excise duty and therefore we respectfully disagree with the contrary view expressed by the Division Bench at paragraphs 31 and 35 of the

judgment in Mangalore Chemicals and Fertilizers Ltd. and Others Vs. Assistant Collector of Central Excise, Mangalore and Others,

15. We are also of the view that even assuming that the trade notice of 1977 was ultra vires the power of the Collector, and had the effect of

expanding the scope of Section 4(4)(d)(ii) of the Act as it stood prior to its amendment by Act 14 of 1982 with retrospective effect from 1-4-

1975, with its amendment with effect from 1-4-1975, it became redundant for, the object sought to be achieved by the trade notice was achieved

by the amended Section 4(4)(d)(ii) by expressly specifying the items of deductions permitted, out of the price charged by the manufacturer to the

buyer. In Mangalore Chemicals and Fertilizers Ltd. and Others Vs. Assistant Collector of Central Excise, Mangalore and Others, the Division

Bench upheld the constitutional validity of Section 4(4)(d)(ii) but struck down the trade notice. As in our view the amended Section 4(4)(d)(ii)

achieved the same object, we agreed with the submission of the learned Counsel for the appellants, that after upholding the validity of Section 4(4)

(d)(ii), the Trade Notice was unnecessary to support the action of the Department which it had taken in Mangalore Chemicals and Fertilizers Ltd.

and Others Vs. Assistant Collector of Central Excise, Mangalore and Others, as the same could be supported under amended Section 4(4)(d)(ii),

but for the interpretation placed by the Division Bench on the provision at paras 31 and 35 of the judgment which we are overruling.

16. To sum up our interpretation of Section 4(4)(d)(ii) is as follows :-

(i) In ascertaining the value of the goods for the purpose of levy of excise duty under the Act, the only items which are deductible out of the

wholesale price for which the goods are sold by a manufacturer to a buyer are those specified in Section 4(4)(d)(ii) of the Act.

(ii) Therefore, if in a given case, if a manufacturer has charged excise duty on items like value of packing charges which are not chargeable to tax

either on account of any mistaken impression or on account of being compelled by the authorities on a misconstruction of the provision and such

collection is found to be unlawful by the Courts, unless the said amount is refunded to the buyer concerned, there is no other alternative than to

treat the said amount as part of the value of the goods. As a result the amount to which the manufacturer would be entitled to refund would be the

amount that had been collected from the buyer which had lost the character of excise duty, minus the excise duty payable on that part of the

amount.

17. The learned Counsel for the respondent, however, contended that Section 4(4)(d)(ii) had no application at all while considering an application

for refund u/s 11B of the Act. The relevant portion of the said section reads :-

Section 11B Claim for refund of duty. - (1) Any person claiming refund of any duty of excise may make an application for refund of such duty to

the Assistant Collector of Central Excise before the expiry of six months from the relevant date.

Provided that the limitation of six months shall not apply where any duty has been paid under protest.

As can be seen from the above provision, any person claiming refund of any excise duty is entitled to make an application before the Assistant

Collector. When such an application is made, the authority has to decide as to whether the applicant is entitled to refund and if so, as to the exact

amount of refund to which the applicant is entitled to. In order to find out as to what is the exact amount to which the party is entitled to, the only

course open to the authority is to find out as to what was the actual duty chargeable u/s 3 of the Act and what was the actual amount of duty paid,

which alone would constitute the basis for determining the amount to be refunded, namely, the difference between the two. Therefore, we are not

impressed by the submission made by the learned Counsel that Section 4(4)(d)(ii) is of no relevance for deciding an application u/s 11B of the Act.

In the present case, as seen earlier, in every one of the Bills, excise duty on the value of the packing material was collected from the buyers and

paid to the Government under protest, during the pendency of Writ Petition No. 5995 of 1975, in which the respondent had challenged the legality

of the levy of excise duty on the value of the packing material. The challenge was upheld and this Court in para 18 of the order which is extracted

earlier said that if any application for refund were to be made by the respondent, it had to be examined in accordance with law. Accordingly, the

application for refund made by the respondent was examined by the 2nd appellant. He held that in view of the judgment in W.P. No. 5995 of

1975 Alembic Glass Industries Limited Vs. Union of India and Others,] holding that no excise duty was leviable on the value of packing materials

and as the respondent had actually included the same in the wholesale price charged to its customers and it was not refunding the said amount to

the buyer concerned, the same had to be included in the value of the goods as it was not one of the deductible items specified in Section 4(4)(d)(ii)

of the Act and the excise duty payable on that amount has to be computed and collected. Therefore, after deducting the said amount required to

be collected, the balance alone could be could be refunded and has been refunded.

18. In the result, we answer the three questions referred for our opinion, as follows :-

(1) As per the second part of the explanation to Section 4(4)(d)(ii) of the Act, the effective rate of duty has to be deducted not only from the

normal price but also from any amount charged and collected as excise duty, but subsequently refunded, if the benefit of refund has not been

passed on to the buyer.

(2) As per clause (ii) of the second part of the explanation to Section 4(4)(d)(ii) of the Act, in cases where the higher rate of duty is initially

assessed and collected from the customers by a manufacturer and paid to the Government and subsequently on a proper computation the excise

duty gets reduced and becomes refundable to the manufacturer, excise duty on the amount so becoming refundable is leviable, if the benefit of such

refund is not passed on to the buyer.

(3) Where full duty is levied on exempted goods, and subsequently as a result of applying the exemption notification, the excess duty is refundable,

such excess amount the benefit of which is not passed on to the buyers becomes part of the normal price, in view of the explanation to Section

4(4)(d)(ii) of the Act.