I.T.C. Ltd. Vs Union of India (UOI) and Others

Civil Writ Jurisdiction case No''s. 939, 1203 and 1252/74

Court: Patna High Court

Date of Decision: Dec. 14, 1976

Acts Referred:
Central Excises and Salt Act, 1944 â€” Section 4#Companies Act, 1956 â€” Section 21, 23#Constitution of India, 1950 â€” Article 226, 227

Citation: (1978) 2 ELT 137 : (1977) 10 PLJR 479

Hon'ble Judges: S.P. Singh, J; S.K. Jha, J

Bench: Division Bench

Final Decision: Allowed

Judgement

S.K. Jha, J.
The petitioner in all these three applications under Articles 226 and 227 of the Constitution of India is the I.T.C. Limited

having its registered office at Calcutta and a factory at amongst other places, Basudeopur in Monghyr in the State of Bihar. The relevant facts for

the disposal of these applications are not at all in dispute.

2. The petitioner carries on the business of manufacturing and selling cigarettes and smoking tobacco of diverse kinds throughout India and owns

and operates five cigarette factories in different States including a cigarette factory at Monghyr in this State. With effect from 1st of April, 1974 the

name of the petitioner company was changed from India Tobacco Company Limited to I.T.C. Limited. Such change was effcted under the

provisions of Section 21 read with Section 23 of the Companies Act, 1956. For all practical purposes it is only the name which has been changed

with the petitioner''s rights and liabilities remaining as they were before such change. The petitioner follows a uniform pattern and procedure for

selling and marketing its products mentioned hereinbefore, in accordance with which the petitioner''s products reach the ultimate consumers of its products through a series of sales and resales in the following manner. The petitioner, which is the manufacturer, sells to the primary wholesale

buyers, or dealers otherwise known in the cigarette industry as distributors who in their turn, sell to secondary wholesalers known in common

parlance in such industry as wholesalers. These secondary wholesalers, in their turn, sell to the retailers who pass on the products by selling to the

consumers at large. The petitioner makes all sales of its products to its distributors otherwise known as wholesale buyers or dealers in large bulk

entirely on a principal to principal basis. Such sales are evinced by written contracts which represent normal commercial arrangements and are

concluded in the usual course of business. During the relevant periods the petitioner never sold its products to any one in the chain set out above

other than the distributors. These writ petitions are in respect of products which were and are sold to such distributors who are primary wholesale

buyers of dealers. All the wholesale prices charged by the petitioner from, its distributors are the sole consideration for the said sales and are

subject to local taxes uniform throughout India. The petitioner does not extend or derive any extra commercial favour or privilege to or from any

wholesale buyer or dealer. The transactions between the petitioner and its wholesale buyers and dealers commonly known as distributors, as

already stated above, are at arm''s length and in the usual course of business and do not have any consideration other than price of the products as

aforesaid. Admittedly, such transactions arc bonafide. Such sales during the relevant periods were completed ex-factory and sometimes outside

the said factory. But in any event the products are always capable of being sold on a wholesale basis ex-factory.

3. The question that arises for consideration in all these applications is as to what should be the amount of excise duty assessable against the

petitioner under the provisions of Section 4(a) of the Central Excises and Salt Act, 1944 (hereinafter to be referred to as the Act) prior to its

amendment in 1973. We are not concerned with that amendment which, as we arc informed at the Bar, came into force with effect from October,

1975.

4. In C.W.J.C. 939/74 the prayer made by the petitioner is for the issuance of appropriate writ quashing the order dated the 4th of April, 1974

passed by the Assistant Collector of Central Excise, Patna, respondent No. 4, dated the 8th of May, 1974 passed by the Inspector, Central

Excise, Range I.T.Co., Monghyr, respondent No. 6, as also that '' dated the 14th of June, 1974 passed by respondent No. 6. These three , orders

are incorporated in Annexures 15, 16 and 16/1 to the writ application. A further prayer has been made for the quashing of Annexure 16/2 dated

the 14th of June, 1974, which is a notice in form D.D. 2 issued by respondent No. 6 under the authority of the Superintendent of Central Excise,

I.T.Co., Monghyr, respondent No. 5. The effect of these impugned annexures is that the Central Excise authorities have disallowed the petitioner''s claim to deduct the post-manufacturing costs and selling expenses from the price charted by the petitioner from its wholesale dealers to ascertain

the assessable value and/or to recover the sum of Rs. 36,90,056.57 which has been demanded as additional excise duty apart from that which has

been shown by the petitioner in its return dulyfiled. A prayer has also been made for the issuance of the writ of prohibition restraining the

respondents from proceeding any further in respect of the show cause notice issued by the Central Excise authority (respondent No. 4) dated the

6th of November, 1973 and 21st of December, 1973, copies of which have been marked Annexures 6 and 8 respectively. This amount of

additional excise duty demanded from the petitioner is in respect of the sales made during the period between the 18th of July, 1973 and the 7th of

February, 1974. On 26.6.1974 this wit application was admitted, rule issued and an order of injunction was passed retrainingthe respondents from

realising the sum of Rs. 36,90,056.57 till the disposal of this application.

5. In C.W.J.C. 1203/74 a prayer has been made for the issuance of appropriate writs quashing Annexures 9, 10, 14 and 15 to the writ

application. Anncxures 9 and 10 both dated the 19th of July, 1974 are orders and provisional assessments made by the Superintendent of Central

Excise, I.T.Co. Monghyr, respondent No. 5 Anhexure 14 dated the 20th of July, 1974 and Amtexurc 15 dated the 12th of July, 1974 also

purport to enforce the provisional assessments made as per Annextires 9 and 10 by the Superintendent of Central Excise respon orders was to

provisionally assess sums o as additional excise duty held by the lent No. 5. The effect of these Rs. 8,50,475.93 and Rs. 22,491.01 Excise

Authority to be payable by the petitioner. This included the marketing, distribution expenses, advertisement expenses, freight, interest, etc. What

had happened was that on 3.3.1974 the petitioner submitted a new price list indicating assessable values computed after eliminating post-

manufacturing costs and expenses. The Excise authorities allowed the petitioner to remove their goods from the factory on the basis of the said

price list under provisional assessment procedure. On 20.7.1974 the Excise authorities made final assessment in respect of the returns in Form RT-

12 for the month of June, 1974 filed by the petitioner and demanded excise duty on post-manufacturing costs and expenses. On 25.7.1974 the

Excise authorities returned the two price lists effective from 7th February, 1974 and 1st March, 1974 submitted earlier by the petitioner purporting

to approve the same and directing the petitioner to clear the goods on the basis of the price list by including post manufacturing costs and expenses

and to pay duty thereon also. This writ application was thereafter filed to restrain the Excise authorities from collecting excjse duty on post-

manufacturing costs and expenses on the basis of the deimands made in the Form RT-12 return for the month of June, 1974 arid orders passed in

relation to the price list effective from the 7th February, 1974 and 1st March, 1974. On 5.8.1974 this writ application was admitted, rule issued in this case and an injunction was issued restraining the respondents from collecting excise duty on post-manufacturing costs and expenses. Despite

the injunction order, the Excise authorities issued a demand notice for payment of a sum of Rs. 27,43,015.40. An amendment petition was

thereafter filed in this Court, which has been allowed. By the aforesaid amendment petition, prayer has been made for quashing of Annexures 16,

17 and 18 which arc demand notices issued against the petitioner in pursuance of the orders aforesaid. This assessment and the consequential

demands are in respect of the manufacture and sale by the petitioner elleeled during the month of June 1974, as stated earlier.

6. In C.W.J.C. 1252/74 the petitioner claims that he had made a declaration of value u/s 4 as effective from the 3rd of July, 1974. Such a

declaration was made as is comtemplatcd by Law. The Superintendent of Central Excise, respondent No. 5, passed orders on such declaration by

the petitioner on 3rd August, 1974 as contained in An-nexure 4 and llth July, 1974 as incorporated in Anncxiire 5, whereby he has ordered that

the wholesale price declared in column 5(c) of the price list which included post-manufacturing costs and expenses was approved and should be

the basis of assessable value as per Section 4(a) of the Act. A prayer has been made for issuance of appropriafe writs quashing suchorders of

respondent No. 5 and directing the Excise authorities to make assessment in accordance with law and restraining them from including post-

manufacturing costs and expenses for the purpose of assessing the excise duty.

7. The question arising for determination in these cases as stated earlier, is the scope and true purport of the provision of Section 4(a) of the Act.

Section 4(a) of the Act reads thus :

* * * * *

8. As a matter of fact, the scope of the aforesaid provision of the Act was a subject-matter for consideration by the Supreme Court, in, inter-alia,

two cases which are reported. It is, therefore, not necessary to go into any detailed analysis of the scheme and purpose of the statutory provision.

Mr. Ranadeb Choudhuri, learned counsel for the petitioner, invited our attention to the two decisions of the Supreme Court in this connection and

a number of decisions of other High Courts. It would be worthwhile to note the principles laid down by the Supreme Court in the two cases of c.

In the Yoltas case (supra), Mathew, J., speaking for the court, held as follows:

There can be no doubt that the ""wholesale cash price"" has to be ascertained only on the basis of transactions at arm''s length. If there is a special

or favoured buyer to whom a specially low price is charged because of extra commercial considerations, e.g. because he is relative of the

manufacturer, the price charged for those sales would not be the ""wholesale cash price"" for levying excise u/s 4(a) of the Act. A sole distributor

might or might not be a favoured buyer according as terms of the agreement with him are fair and reasonable and were arrived at on purely commercial basis. Once wholesale dealings at arm''s length are established, the determination of ""the wholesale cash price"" for the purpose of

Section 4(a) of the Act may not depend upon the number of such wholesale dealings. The fact that the appellant sold 90 to 95 per cent of the

articles manufactured to consumers direct would not make the price of the wholesale sales of the rest of the articles any the less the ""wholesale

cash price"" for the purposes of Section 4(a), even if these sales were made pursuant to agree-ments stipulating for certain commercial advantages,

provided the agreements were entered into at arm''s length and in the ordinary course of business.

9. It was further held considering the decision of the Judicial Committee of the Privy Council in the case of Vacuum Oil Co. v. Secy, of State, 59

Ind App. 258 as follows :

The price is to be a price for goods, as they are both at the ''time'' and ''place'' of importation. It is to be a ''cash price'' that is to say a price free

from any augmentation for credit or other advantage allowed to a buyer ; it is to be a net price, that is to say it is a price Mess trade discount.'' The

Lord! hips, therefore, held that the, words the ""wholesale price"" were used in the section in contradistinction to a ""retail price"", and that not only on

the ground that such is a well recognised meaning of the words but because their association with the words ""trade discount"" indicates that sales to

the trade are those in contemplation, and also because only by attaching that meaning to the word is the ""wholesale price"" relieved of the loading

representing importation expenses which, as a matter of business, must always be charged to the consumer, and which are eliminated.

10. It has further been held that excise is a tax on production and manufacture of goods. Section 4 of the Act provides that the real value should be

found after deducting the elling cost and selling profits and that the real value can include only the manufacturing cost and the manufacturing profit.

The section makes it clear that excise is levied only on the ""amount representing the manufacturing cost plus the manufacturing profit and excludes

post-manufacturing cost and the profit arising from post-manufacturing operation, namely, selling profit. The section postulates that the wholesale

price should be taken on the basis of cash payment thus eliminating the interest involved in wholesale price which gives credit to the wholesale

buyer for a period of time and that the price has to be fixed for delivery at the factory gate thereby eliminating freight, octroi and other charges

involved in the transport of the articles"". In determining such wholesale price, it is not necessary that there should be large number of wholesales

and quantum of goods sold by a manufacturer on wholesale basis is entirely irrelevant for the purpose. When the matter again came up for

consideration in the case of Atic Industries (supra) their Lordships of the Supreme Court went further. In that case the sales in question were

effected by the manufacturers to I.C.I, and Atul at the price less 18 per cent trade discount. The I.C.I, and Atul were primary wholesalers who, having purchased from the manufacturer, the Atul Industries, in their turn, sold to secondary wholesalers. The facts of the case, therefore, are very

much akin to the facts of the instant cases. The question that fell for consideration was as to what should be the price for the purpose of assessment

of excise duty whether the price charged from the primary wholesalers, namely, I.C.I and Atul or that charged from the secondary wholesalers by

I.C.L and Atul; while overruling the contention put forward on behalf of the Excise Department, Bhagwati, J, speaking for the Court, held as

follows :-

Here, on the contrary, no retail sales at all were effected by the appellants and the entire production was sold in wholesale to I.C.I, and Atul under

agreements entered into with them. Moreover, it was not in dispute between the parties that the agreements entered into by the appellants with

I.C.I, and Atul were made at arm''s length and in the usual course of business. It was not the case of the Excise Authorities at any time that

specially low prices were charged by the appellant to I.C.I. and Atul because of extra-commercial considerations or that the agreements were

anything but fair and reasonable or arrived at on purely commercial basis. The wholesale dealings between the appellants and I.C.I, and Atul were

purely commercial dealings at arm''s length and the price charged by the appellants for sales in wholesale made to I.C.I, and Atul less trade

discount of 18% was therfore clearly ''wholesale cash price'' within the meaning of sales and it did not make any difference that the wholesale

dealings of the appellants were confined exclusively to I.C.I, and Atul andapart from these two, no independent buyers could purchase the dye-

stuffs in wholesale from the appellants.""

11. It has further been laid down in the case of Atic Industries that Section 4 ''makes it clear that excise is levied only on the amount representing

the manufacturing cost plus the manufacturing profit and excludes post-manufacturing cost and profit arising from post-manufacturing operation,

namely, selling profit. The value of the goods for the purpose of excise, therefore, must take into account only the manufacturing profit and it must

not be loaded with post-manufacturing cost or profit arising from post-manufacturing operation. The price charged by the manufacturer for sale of

the goods in wholesale would thus represent the real value of the goods for the purpose of assessment of excise duty. If the price charged by the

wholesale dealer who purchases the goods from the ""manufacturer and sells them in wholesale to another dealer were taken as the value of the

goods. It would include not only the manufacturing cost and the manufacturing profit of the manufacturer but also the wholesale dealer''s selling cost

and selling profit and that would be wholly incompatible with the nature of excise. In rny view, the ratio of the two Supreme Court decisions

referred to above, especially that of the latter case, squarely covers the point at issue in the instant cases. As I have already indicated at the ouset the facts are not in controversy. Therefore, it goes without saying that excise can be levied against the petitioner only on the amount representing the manufacturing cost plus the manufacturing profit and it must, in the fitness of things, exclude post-manufacturing cost and the profit arising from the post-manufacturing operation, namely, the selling profit. The only relevant consideration for the purpose of excise would be the manufacturing cost plus the manufacturing profit and the Excise Authorities shall not be justified in loading the value of product of the petitioner for the purpose of assessment of excise duty u/s 4 of the Act with any post-manufacturing cost or profit arising from the post-manufacturing operation. The price charged by the petitioner ex factory at the factory gate from its distributors representing the manufacturing cost alone plus the manufacturing profit shall determine the value for the purpose of assessment of excise duty. Although it is not '' necessary for me, in view of the decisions of the Supreme Court on these points, I think it worthwhile to observe that could be the only possible construction of Section 4 for computing the value of the products assessable to excise duty. It will be manifest that excise duty is levied by the Parliament on tobacco and other goods which are manufactured and produced in India under Entry 84 of List 1 of the 7th Schedule, to the Constitution of India whereas if any post-manufacturing cost is to be, included in the price, it will also entail in its turn and embrace within its sweep a certain amount of tax falling under the head-Sales tax which is exclusively within the domain of the State Legislature under Entry 54 of List 11 of the 7th Schedule. This, in my view, reinforces the rationale behind the decisions of the Supreme Court referred to above that excise is a tax on the production and manufacture of goods and hence must necessarily exclude from its sweep any post-manufacturing expenses or selling profits.

12. I may now refer to the decisions of the different High Courts to which our attention was invited by Mr. Ranadcb Choudhuri, Learned Counsel for the petitioner, the writ case of Indian Tobacco Co. Ltd. v.Union of India (Misc. Petn. No. 293 of 1974) decided by a Bench of the Bombay High Court on 15-12-1975, incidentally, the petitioner in that case was also the Indian Tobacco Company Limited. The other cases referred to at the Bar were those of Union of India v. I.T.C. (Writ Appeals Nos. 8 and 13 of 1975 decided on 20-2-1976) in which a Bench of the Karnataka High Court at Bangalore laid down, the law to the same effect, so are also a decision of the Andhra Pradesh High Court in Vazir Sultan Tobacco Co. Ltd. v. Union of India (Writ Petns. Nos. 1748 and 7143 of 1974 and 2274, 2275 and 5136 of 1975) decided on 19-12-1975 and that of Madras High Court in Madras Rubber Factory Ltd. v. Supdt. of Central Excise 1977 85 E.L.T. . Its is needless to multiply the decisions of the various High Courts.

13. Mr. Ashwini Kumar Sinha, learned Standing Counsel for the Union of India, raised a number of points. In his painstaking arguments, he merely

repeated, if I may say so with respect, the arguments which were advanced in the different cases both befpre the Supreme Court and before the various High Courts and which arguments not only did not find favour but were also categorically repelled and overruled in those decisions and, therefore, it is not necessary to mention his submissions at any length.

14. From the discussion of the law on the subject detailed above, it is clear that the respondents have exceeded their jurisdiction in demanding from the petitioner for the purpose of excise duty payable by its price of products inclusive of any post-manufacturing cost and selling expenses. It is however, not possible for us, while deciding these writ applications, to say with any amount of precision as to which particular items represent post-manufacturing cost or selling expenses. These impugned demands (namely, of Rs. 36,90,056.57 in C.W.J.C. 939/74 and of Rs. 27,43,015.40 in C.W.J.C. 1203/74) however, must be and are hereby quashed and the respondents are directed to reassess the excise duty in accordance with the principles laid down above on the value of the products of the petitioner for the provisions of Section 4(a) of the Act and in so doing they are hereby commanded to exclude from the value of its products all post-manufacturing cost and selling profits and then arrive at the correct assessable value for the purpose of excise duty in accordance with law.

15. In the result, all these three writ applications are allowed. So far as C.W.J.C. 1252/74 is concerned, all the reliefs prayed for must be allowed for the petitioner has merely sought for a discretion to the respondents to make assessment in accordance with law. In so far as the other two writ applications are concerned, while quashing the orders of the respondents and the consequent demand notices as incorporated in Annexures 15,16, 16/1 and 16/2 of C.W.J.C. 939/74 and those in Annexures 9, 10, 14, 15, 16, 17 and 18 of C.W.J.C. 1203/74, I remit all the three cases back in the exercise of our jurisdiction under Article 227 of the Constitution to the competent Excise Authority to go into the questions as indicated above and make his decision in the light of the directions given above and in accordance with law. In the circumstances of the cases there shall be no order as to costs.