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A. K. ROY & ANR.

v.

VOLTAS LIMITED

December 1, 1972

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[A. N. GROVER, K. K. MATHEW AND A. K. MUKHERJEA, JJ.]

Central Excises & Salt Act 1944, S. 4(a)—Bulk of sales to consumers direct—Some goods sold also to wholesalers at 22 per cent trade discount—Duty whether to be levied on 'wholesale cash price' or on list price of sale to consumers—Wholesale market, what is—Ingredients of section—Components of 'wholesale cash price'.

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The respondent was a limited company and carried on, among others, the business of manufacturing air-conditioners, water coolers and component parts thereof. Most of its sales—to the extent of 90 to 95 per cent—were made by it directly to consumers at list prices. It, however, also sold the articles to wholesale dealers from different parts of the country in pursuance of agreements entered into with them. The agreements provided among other things, that the dealers should not sell the articles sold to them except in accordance with the list prices fixed by the respondent, that the respondent would sell them the articles at the list prices less 22 per cent discount, that the dealers will not be entitled to any discount on the prices of accessories mentioned in the price schedule and that the dealers should give service to the units sold in their territory.

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Excise duty on the basis of *ad valorem* value was imposed on air-conditioners and parts of water coolers with effect from March 1, 1961. The respondent claimed, in accordance with s.4(a) of the Central Excises and Salt Act 1944, that the list price after deducting the discount of 22 per cent allowed to the wholesale dealers would constitute the 'wholesale cash price' for ascertaining the real value of the articles. This case was accepted by the excise authorities and assessments were made up to the end of 1962 on that basis. Later however the Superintendent of Central Excise intimated the respondent that excise duty would be assessed and levied not on the basis of wholesale cash price but on the basis of retail price under s.4(b) of the Act. Assessments for the period January 1, 1963 to December 31, 1963 were made on the basis of list prices, for sales to consumers. The respondent's appeal having been dismissed by the first appellant, the respondent filed a writ petition in the High Court. The High Court allowed the petition holding that the price for which the articles were sold to the wholesale dealers, less the discount allowed to them under the agreements represented the 'wholesale cash price' and that excise duty was chargeable under s.4(a) of the Act. Appeal to this Court was filed by certificate.

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Dismissing the appeal,

HELD: (i) For a wholesale market to exist it is not necessary that there should be a market in the physical sense of the term where articles of a like kind and quality are or could be sold or that the articles should be sold to so-called independent buyers. [1093 G]

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Even if there was no market in the physical sense of the term at or near the place of manufacture where the articles of a like kind and quality are or could be sold, that would not in any way affect the existence of market in the proper sense of the term provided the articles themselves could be sold wholesale to traders, even though the articles are sold to them on the basis of agreements which confer certain advantages upon

them. The application of s.4(a) does not depend upon any hypothesis to the effect that at the time or place of sale, any further articles of like kind and quality should have been sold. If there is an actual price for the goods themselves at the time and place of sale and if that is a 'wholesale cash price', the clause is not inapplicable for want of sale of other goods of like kind and quality. [1093 H]

(ii) There can be no doubt that the 'wholesale cash price' has to be ascertained only on the basis of transactions at arms length. Once that is established the determination of the wholesale cash price for the purpose of s.4(a) of the Act may not depend upon the number of such wholesale dealings. The fact that the respondent 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 anytheless the 'wholesale cash price' for the purpose of s.4(a) even if those sales were made pursuant to agreements stipulating for certain commercial advantages, provided the agreements were entered into at arms length and in the ordinary course of business. [1097 B]

(iii) The Privy Council held in the case of *Vacuum Oil Company* that the words 'wholesale price' were used in contra-distinction to a 'retail price'. The term 'cash price' was held to mean price from any augmentation for credit or other advantages to the buyer; it is to be net price that is to say 'less trade discount'. [1098 B-C]

Excise is a tax on the production and manufacture of goods. Section 4 of the Act therefore provides that the real value should be found after deducting the selling cost and selling profit and that the real value can include only the manufacturing cost and the manufacturing 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. [1098 E]

(iv) The appellant's contention that 22 per cent discount allowed to the wholesalers was not 'trade discount' was not raised before the High Court and therefore would not be considered.

Ford Motor Company of India Limited v. Secretary of State for India in Council, 65 Indian Appeal, 32 *Vacuum Oil Company v. Secretary of State for India in Council* 59 Indian Appeals 258, applied.

National Tobacco Co. of India Ltd. v. Collector of Central Excise and others, A.I.R. 1961 Calcutta 477, *Union of India v. Vengunta Survaprasada Rao and Another*, A.I.R. 1967 Andhra Pradesh 281, *Amco Batteries (P) Ltd. Bangalore v. Assistant Collector, Central Excise, Bangalore and Another*, A.I.R. 1963 Mysore 216, *Collector of Central Excise and Others v. Shankarlal Agarwalla*, A.I.R. 1968 Calcutta 154 and *Frizai Corporation v. The Collector of Central Excise*, 1969 II Andhra Weekly Reporter 57, disapproved.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 47 of 1972.

Appeal by certificate from the judgment and order dated August 14, 17, 1970 of the Bombay High Court in Misc. Petition No. 324 of 1967.

A V. S. Desai, Govind Das, B. H. Antia and B. D. Sharma, for the appellants.

Soli J. Sorabji, K. D. Mehta, P. C. Bhartari, and Ravinder Narain, for the respondent.

Soli J. Sorabji, D. B. Engineer, P. C. Bhartari and Ravinder Narain, for the intervener (Attice Industries Ltd.)

B Soli J. Sorabji and H. K. Puri for the intervener (Bhavsar Chemical Works).

Soil J. Sorabji, P. C. Bhartari and Ravinder Narain, for the Intervener (Delhi Cloth & General Mills Ltd.).

C MATHEW, J.—Voltas Ltd., the respondent here, filed a writ petition before the High Court of Bombay, challenging the validity of the appellate order passed by the 1st appellant on May 2, 1967, in respect of the liability of the respondent to pay excise duty for the year 1963 and the orders of the Assistant Collector of Central Excise relating to the liability of the respondent to pay excise duty for the years 1962, 1964, 1965 and 1966, as also the notice demanding the assessed amount of Rs. 27,57,177.19. The High Court allowed the petition. This appeal, by certificate, is against that order.

E Voltas Ltd. is a company registered under the Companies Act. It carries on, among others, the business of manufacturing air conditioners, water coolers and component parts thereof. It organises the sales of these articles from its head office at Bombay as also from its branch offices at Calcutta, Delhi, Madras, Bangalore, Cochin and Lucknow. From these offices it effects direct sales to consumers at list prices and the sales so effected come to about 90 to 95 per cent of its production of these articles in the factory in question during the relevant period. Apart from these sales, it also sells the articles to wholesale dealers from different parts of the country in pursuance of agreements entered into with them. The agreements with the wholesale dealers for the relevant years contained terms and conditions similar to those mentioned in Exhibit A annexed to the writ petition. The agreements provided, among other things, that the dealers should not sell the articles sold to them except in accordance with the list prices fixed by the respondent, that the respondent would sell them the articles at the list prices less 22 per cent discount, that the dealers will not be entitled to any discount on the prices of accessories mentioned in the price schedule and that the dealers should give service to the units sold in their territory.

H Excise duty on the basis of *ad valorem* value was imposed on air conditioners, water coolers and parts of water coolers from March 1, 1961. The respondent's case was that the list price after

deducting the discount of 22 per cent allowed to the wholesale dealers would constitute the 'wholesale cash price' for ascertaining the real value of the articles. This case was accepted by the excise authorities and assessments were made upto the end of 1962 on that basis.

In April, 1964, the Superintendent of Central Excise intimated the respondent that excise duty would be assessed and levied not on the footing of the 'wholesale cash price' but on the basis of the retail price and, by his three orders dated September 5, 1964 and one dated September 10, 1964, he assessed the respondent to excise duty in respect of the sales on the footing of list prices for sale to consumers for the period from January 1, 1963, to December 31, 1963, and a notice of demand dated October 8, 1964, was served on the respondent calling upon it to pay the above sum. The respondent filed an appeal against the orders but that was dismissed by the 1st appellant by his order dated May 2, 1967 and this was the main order that was challenged in the writ petition.

The question that was canvassed before the High Court was whether the respondent was liable to be charged with excise duty on the basis of the price of retail sales made by it directly to the consumers from its head office and branch offices under clause (b) of s. 4 or whether it was liable to be charged on the basis of the price payable by the wholesale dealers; after deducting the 22 per cent discount, under clause (a) of s. 4 of the Central Excises and Salt Act 1944 (hereinafter referred to as the 'Act')?

The High Court held that the price for which the articles were sold to the wholesale dealers less the discount allowed to them under the agreements represented the 'wholesale cash price' and that excise duty was chargeable under s. 4(a) of the Act.

Section 4 of the Act provides :

"4. Where under this Act, any article is chargeable with duty at a rate dependent on the value of the article, such value shall be deemed to be—

- (a) the wholesale cash price for which an article of the like kind and quality is sold or is capable of being sold at the time of the removal of the article chargeable with duty from the factory or any other premises of manufacture or production for delivery at the place of manufacture or production, or if a wholesale market does not exist for such article at such place, at the nearest place where such market exists, or

A (b) where such price is not ascertainable, the price
 at which an article of the like kind and quality
 is sold or is capable of being sold by the manu-
 B facturer or producer, or his agent, at the time
 of the removal of the article chargeable with duty
 from such factory or other premises for delivery
 at the place of manufacture or production, or
 if such article is not sold or is not capable of
 being sold at such place, at any other place nearest
 these to

C *Explanation* : In determining the price of any article
 under this section, no abatement or deduction shall 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."

D The appellants contended that the agreements with the whole-
 sale dealers conferred certain extra-commercial advantages upon
 them, and so, the sales to them were not sales to independent
 purchasers but to favoured ones, and, therefore, the price charged
 would not represent the "wholesale cash price" as mentioned in
 s. 4(a) of the Act. They argued that s. 4(a) visualizes a whole-
 sale market at the place of manufacture where articles of like
 kind and quality are sold or could be sold and that it also postu-
 E lates a market where any wholesale purchaser can purchase the
 articles, and, as no articles of a like kind and quality were sold,
 at or near the place of manufacture, and as the wholesale sales
 were confined to the favoured buyers, there was no wholesale
 market at the place of manufacture. It was further argued that
 "articles of a like kind and quality" is a phrase which suggests
 F goods other than those under assessment and that one must dis-
 regard the price fetched by the sale of the goods themselves.

G We do not think that for a wholesale market to exist, it is
 necessary that there should be a market in the physical sense of the
 term where articles of a like kind or quality are or could be sold
 or that the articles should be sold to so-called independent buyers.

H Even if it is assumed that the latter part of s. 4(a) proceeds
 on the assumption that the former part will apply only if there is
 a wholesale market at the place of manufacture for articles of a
 like kind and quality, the question is what exactly is the concept
 of wholesale market in the context. A wholesale market does
 not always mean that there should be an actual place where arti-
 cles are sold and bought on a wholesale basis. These words can
 also mean the potentiality of the articles being sold on a wholesale
 basis. So, even if there was no market in the physical sense of

the term at or near the place of manufacture where the articles of a like kind and quality are or could be sold, that would not in any way affect the existence of market in the proper sense of the term provided the articles themselves could be sold wholesale to traders, even though the articles are sold to them on the basis of agreements which confer certain commercial advantages upon them. In other words, the sale to the wholesale dealers did not cease to be wholesale sales merely because the wholesale dealers had entered into agreement with the respondent under which certain commercial benefits were conferred upon them in consideration of their undertaking to do service to the articles sold, or because of the fact that no other person could purchase the articles wholesale from the respondent. We also think that the application of clause (a) of s.4 of the Act does not depend upon any hypothesis to the effect that at the time and place of sale, any further articles of like kind and quality should have been sold. If there is an actual price for the goods themselves at the time and place of sale and if that is a 'wholesale cash price', the clause is not inapplicable for want of sale of other goods of a like kind and quality.

In *Ford Motor Company of India Limited v. Secretary of State for India in Council*⁽¹⁾ the appellants before the Privy Council, who imported Ford Motor vehicles from Canada to India, where they had a monopoly of the supply of those vehicles, sold them only to authorised dealers or distributors, each of whom was sole agent for a retail seller of the vehicles in a particular district. The appellants obtained from the distributors information as to their future requirements and placed consolidated orders accordingly with the manufacturers in Canada. The retail price charged by the distributors to the public was that stated in a price list issued by the appellants and current at the time of the arrival of vehicles in India, and the price payable by the distributors to the appellants was the same price less a discount of 20 per cent. The distributors had to pay that price before obtaining delivery, which was given "free on rail". On arrival in India the vehicles were not completely assembled, and were so delivered to the distributors, an agreed allowance against the price being made by the appellants. On the question whether s. 30(a) or 30(b) of the Sea Customs Act, 1878, applied for the purpose of finding out the real value of the goods for levy of customs duty, the Privy Council held that the price charged by the appellants to the distributors excluding the assembling allowance was the "wholesale cash price, less trade discount" for which the vehicles were sold "at the time and place of importation" within the meaning of s. 30(a) of that Act, the terms of which are more or less similar to those of s. 4(a) of the Act. This case is an authority for the

(1) 65 Indian Appeals 32.

A proposition that mere existence of the agreements between the respondent and the wholesale dealers under which certain obligations were undertaken by them like service to the articles, would not render the price any the less the 'wholesale cash price'. To put it in other words, even if the articles in question were sold only to wholesale dealers on the basis of agreements and not to independent persons, that would not make the price for the sales anything other than the 'wholesale cash price'. The argument that what was relevant to determine the 'wholesale cash price' under cl. (a) of s. 30 of the Sea Customs Act, 1878, was the price of goods of a like kind and quality was negatived by the Privy Council by saying that goods under assessment may, under cl. (a) be considered as members of their own class even though at the time and place of importation there are no other members and that the price obtained for them may correctly represent the price obtainable for goods of a like kind and quality at the time and place of importation.

D Counsel for the appellants submitted that the preponderance of authority in the various High Courts is in favour of the view that in order that sales might be wholesale sales, the purchasers must be independent persons.

E In *National Tobacco Co. of India Ltd. v. Collector of Central Excise and others*⁽¹⁾ a learned single Judge of that Court held that the word 'wholesale market' must mean a place where articles are habitually sold to any person who wishes to make a purchase and that, merely because a factory manufactures the articles at a particular place and sells them there to its stockists or dealers would not, by itself, convert it into a wholesale market and the question whether there is a 'wholesale market' at that location would depend upon a variety of questions, namely, whether goods were really being sold wholesale and whether any person wishing to purchase the goods could do so at the location. The Court also said that, in order that the price may be the 'wholesale cash price' it is necessary that the transaction should be between a manufacturer and an independent purchaser. In other words, the Court was of the view that if the transaction was between a manufacturer and a 'favoured purchaser', the price paid by him would not be the 'wholesale cash price' within the meaning of s. 4 (a) of the Act.

H In the *Union of India v. Vengunta Suryaprakasa Rao and Another*⁽²⁾, the Court said that the sale to wholesale distributors with whom the company in question had entered into agreements for sale of the articles stipulating for certain commercial advantages would not constitute the price of those sales "wholesale cash price" as mentioned in s. 4(a). The Court further said that

(1) A.I.R. 1961 Calcutta 477.

(2) A.I.R. 1967 Andhra Pradesh 281.

since the manufacturer was not free to sell the article to others by virtue of the agreement and, as in fact, no independent sales were proved to have been made to anyone other than the authorised distributors, the sales were not sales in the wholesale market. The Court referred to the decision of the Privy Council in *Ford Motor Company of India Ltd. v. Secretary of State for India in Council* (supra) but did not seem to have appreciated the real ratio of the case.

In *Amco Batteries (P) Ltd. Bangalore v. Assistant Collector, Central Excise, Bangalore and Another*⁽¹⁾, the Court said that wholesale price means the price which a wholesale dealer, and not the retail dealer, charges for his goods when he sells them in wholesale units and what constitutes wholesale unit will have to be determined with reference to the practice of the trade at the place where the goods are sold. A wholesale market, according to the Court, is a place where goods in question or goods of a like kind and quality, are sold, or, are capable of being sold to independent buyers meaning thereby, anyone who intends to effect such purchase upon payment of proper price without restriction.

In *Collector of Central Excise and Others v. Shankarlal Agarwalla*⁽²⁾ the Court followed its earlier decision already referred to and said that the 'wholesale cash price' means the price which a wholesale dealer and not a retail dealer charges for his goods when he sells them in wholesale units in a wholesale market. The Court also said that the words wholesale market mean a place where the articles in question are habitually sold to any body who wishes to make a purchase at wholesale price and the mere fact that a factory manufactures articles at a particular place and sells them there to stockists or dealers will not by itself convert the place of sale into a wholesale market.

In *Frizair Corporation v. The Collector of Central Excise*^(*), the Court held that a sale to a favoured buyer cannot be regarded as a sale in a wholesale market and that in the light of the language of clause (a) to s. 4 of the Act a sale by the manufacturer at the factory, by itself, would not be sufficient to constitute the price of the sale the 'wholesale cash price'.

We do not think that these decisions in so far as they hold that the price of sales to wholesale dealers would not represent the 'wholesale cash price' for the purpose of s. 4(a) of the Act merely because the manufacturer has entered into agreements with them stipulating for commercial advantages, are correct. If a manufacturer were to enter into agreements with dealers for wholesale sales of the articles manufactured on certain terms and

(1) A.I.R. 1963 Mysore 216.

(2) A.I.R. 1968 Calcutta 154.

(3) (1969) II Andhra Weekly Reporter 57.

A conditions, it would not follow from that alone that the price for those sales would not be the 'wholesale cash price' for the purpose of s. 4(a) of the Act if the agreements were made at arms length and in the usual course of business.

There can be no doubt that the 'wholesale cash price' has to be ascertained only on the basis of transactions at arms length.

B 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 under 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 arms length are established, the determination of the wholesale cash price for the purpose of s. 4(a) of the Act may not depend upon the number of such wholesale dealing. The fact that the respondent 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 purpose of s. 4(a), even if these sales were made pursuant to agreements stipulating for certain commercial advantages, provided the agreements were entered into at arms length and in the ordinary course of business.

The next question is : what exactly is the meaning of the term

E the 'wholesale cash price' ? In *Vacuum Oil Company v. Secretary of State for India in Council*(¹), it was held that the term means the price paid by retail traders on wholesale purchase. The essence of the idea is that the purchase must be a wholesale purchase and not a retail one. In other words, the sale must be wholesale and not a retail one in order that the price realised may

F be termed the 'wholesale cash price'. In that case the appellants before the Privy Council imported at Bombay, very large quantities of lubricating oil of a particular manufacture and mark. They sold it direct to numerous customers, never to dealers. The price they charged was the same whether a large or small quantity was bought, except that if a consumer contracted to buy from them all his requirements for a year, he was entitled to a discount from 2½ to 15 per cent according to the quantity bought in the year. No other lubricating oil of a like kind and quality was sold in Bombay. On the question whether the appellant was bound to pay customs duty on the basis of clause (a) or clause

G (b) of s. 30 of the Sea Customs Act, 1878, the Privy Council held that since the sales were to customers direct, the real value of the goods cannot be ascertained under clause (a) of s. 30 and that clause (b) of s. 30 was applicable. Their Lordships said

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(1) 59 Indian Appeals, 258.

that in determining the price which is to represent the real value of the goods to be taxed, "the price must be conservative in every respect and free in particular from any loading for any post importation charges incurred in relation to the goods". "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 'less trade discount'". Their Lordships, therefore, held that the words the 'wholesale price' were used in the section in contra-distinction 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 post-importation expenses which, as a matter of business, must always be charged to the consumer, and which are eliminated.

Excise is a tax on the production and manufacture of goods [see *Union of India v. Delhi Cloth and General Mills*(¹)]. Section 4 of the Act therefore provides that the real value should be found after deducting the selling cost and selling profit 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. As already stated it is not necessary for attracting the operation of s. 4(a) that there should be a large number of wholesale sales. The quantum of goods sold by a manufacturer on wholesale basis is entirely irrelevant. The mere fact that such sales may be few or scanty does not alter the true position.

The appellant contended that 22 per cent discount allowed under the agreements with the wholesale dealers was not trade discount. On the ground that there was no evidence to show that the discount allowed was 'trade discount' within the meaning of the Explanation to s. 4. There was no contention by the appellants before the High Court that the discount allowed to the

(1) [1963] Supp. 1 S.C.R. 586.

A wholesale dealers was not 'trade discount'. The whole argument before the High Court proceeded on the basis that direct sales by the respondent to consumers constituted the major portion of the sales and that the sales to the wholesale dealers only represented a minor portion and, therefore, the price charged for the sales to wholesale dealers would not represent the 'wholesale cash price' of the articles sold. No data was placed before the High Court by the appellant to show that the 22 per cent discount did not represent 'trade discount' for the purpose of the Explanation. A 'trade discount' is a percentage deduction from the regular list or catalogue price of goods. As there was no case for the appellants that there was any secret arrangement between the wholesale dealers and the respondent in respect of the sales to them or that the price of the articles was under-stated in the agreements or that any extra-commercial advantages to the dealers were taken into account in fixing the price, we do not think that we should go into the question whether the discount allowed to the wholesale dealers was 'trade discount' or not for the purpose of the Explanation.

D

We think the High Court was right in its conclusion.

We dismiss the appeal but in the circumstances make no order as to costs.

G.C.

Appeal dismissed.