

UNION OF INDIA
v.
INDALCO INDUSTRIES

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APRIL 3, 2003

[SYED SHAH MOHAMMED QUADRI AND ASHOK BHAN, JJ.]

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Central Excise Act, 1944—Sections 4(1)(a) and (b) and 11-A—Levy of excise duty—Allegation of non levy and short levy due to clandestine removal of goods and incorrect valuation—Show cause notice demanding duty on both the grounds—Notice challenged by assessee—High Court dismissed the writ petition with regard to clandestine removal—However disposed of the petition in respect of incorrect valuation—On appeal, held—Show cause notice regarding incorrect valuation was without jurisdiction as it had proceeded on the basis as if valuation were to be under Section 4(1)(b) while the valuation were to be under Section 4(1)(a)—Assessee cannot be denied relief on one aspect on the ground of lack of jurisdiction of the authority merely because authority was held to have jurisdiction on another aspect—Central Excise Valuation Rules, 1975—Rules 1 to 7.

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Constitution of India, 1950—Articles 136 and 226—Taxation matters—Interference with at the stage of show cause notice—Propriety of—Held, generally it is inappropriate for High Court to interfere—But this limitation is self imposed by the Court and the same is not matter of jurisdictional factor—In the facts of the case, writ petition having been decided on merit by High Court, it is inappropriate to upset order of High Court under Article 136 on technical ground.

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Revenue issued show cause notice against the respondent-assessee under Section 11A of Central Excise Act, 1944 demanding duty on the allegation that due to clandestine removal of goods and incorrect valuation of the goods of the respondent-assessee, there had been non-levy and short levy of excise duty. The assessee without replying to the show cause notice, challenged the same before High Court in a writ petition. In so far as paragraphs 1 to 13 of the show cause notice which related to the clandestine removal of the goods were concerned, High Court dismissed the writ petition. With regard to the valuation of the goods mentioned in paras 14 to 18, High Court quashed the above paras taking the view that

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A no enquiry was made by the appellant with regard to the aspects stated thereunder and the writ petition was disposed of.

B In appeal to this Court Revenue contended that High Court ought not to have decided the case on merit at the stage of show cause notice; and that High Court having found that Revenue had jurisdiction to issue notice u/s 11A in respect of Paras 1 to 13 regarding clandestine removal of goods, it should not have issued writ of prohibition in respect of valuation of goods and should have directed the assessee to file reply in respect of the same.

C Respondent-assessee contended that Section 4(1)(b) of the Act cannot be invoked when the goods are sold in the wholesale trade and they are to be valued under Section 4(1)(a) on the basis of normal price thereof, therefore, the authority had no jurisdiction to issue the notice and hence High Court was right in issuing the prohibition; and that if two cases are clubbed in one notice, one without jurisdiction and the other with

D jurisdiction, the writ petitioner cannot be denied remedy in the other cause on the sole ground that in one cause the authority was held to have jurisdiction in the matter.

Dismissing the appeal, the Court

E HELD: 1.1. A reading of Section 4(1)(a) of Central Excise Act, 1944 makes it clear that where duty of excise is chargeable on the excisable goods with reference to value, the normal price at which the goods are ordinarily sold to a buyer by the assessee in the course of wholesale trade for delivery at the time and place of removal will be the measure of charge.

F This is subject to (i) the buyer is not the related person and (ii) the price is the sole consideration for sale. The question of determination of the nearest ascertainable equivalent thereof would arise where the normal price of such goods is not ascertainable either because (a) such goods are not sold or (b) for any other reason like the normal price being incorrectly represented, etc. All the requirements of Section 4(1)(a) are fulfilled; the

G buyer is not a related person and that the price is the sole consideration for sale. The goods in question are, therefore, assessable to excise duty with reference to the normal price at which such goods are ordinarily sold by the assessee to a buyer in the course of whole sale trade for delivery at the time and place of removal. [383-C-G]

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1.2. In the instant case, there is nothing to suggest in paragraphs (14) to (18) of the show cause notice that either the buyer was a related person or that the price was not the sole consideration or there was other vitiating circumstance to doubt the normal price of the wholesale trade. If that be so, recourse to clause (b) of sub-section (1) of Section 4 could not be had. The allegations contained in paragraphs (14) to (18) proceed on the basis as if the valuation of the goods ought to be under clause (b) ignoring the provision of clause (a) of sub-section (1) of Section 4, the authority lacks jurisdiction to issue notice calling upon the assessee to show cause in the matter. [383-H; 384-A-C]

2. It cannot be accepted that under Section 11-A, the authority did have power and the High Court had itself found in regard to paragraphs (1) to (13) and directed inquiry in respect of the clandestine removal of the goods and that the assessee could have been directed to file a reply in regard to the matters concerning the incorrect valuation and the High Court ought not to have interfered. If an authority which has jurisdiction in regard to one aspect takes upon itself to make enquiry into a matter in respect of which it had no jurisdiction then merely because in regard to one aspect it has jurisdiction, the court cannot ignore the fact of lack of jurisdiction and allow the Tribunal to proceed with the matter in respect of which it has no jurisdiction to make inquiry. The position that valuation once accepted under clause (a) and there being no vitiating factor, no recourse can be had to valuation under clause (b) is settled position of law. Therefore, at this stage, if the party is directed to go back to the authority, it would be directing it to undergo a futile exercise. [384-F-H; 385-A]

3. In matters of taxation, it is inappropriate for the High Court to interfere in exercise of jurisdiction under Article 226 of the Constitution either at the stage of show cause notice or at the stage of assessment where alternative remedy by way of filing a reply or appeal, as the case may be, is available but these are the limitations imposed by the courts themselves in exercise of their jurisdiction and they are not matters of jurisdictional factors. Had the High Court declined to interfere at the stage of show cause notice, perhaps this court would not have been inclined to entertain the special leave petition; when the High Court did exercise its jurisdiction, entertained the writ petition and decided the issue on merits, it is not appropriate to upset the impugned order of the High Court under Article 136 of the Constitution on a technical ground. [384-C-E]

A CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7860 of 1996.

From the Judgment and Order dated 10.1.1996 of the High Court of U. P. at Allahabad in CMWP-1102/95.

B K.C. Kaushik, Ms. Rekha Pandey, B. Krishna Prasad for the Appellant.

K.K. Venugopal, A.M. Singhvi, Shahik Raizvi, Ms. Gauri Rasgotra, Ms. Sumitra Goel, Suman Jyoti Khaitan for the Respondent.

C The Judgment of the Court was delivered by

SYED SHAH MOHAMMED QUADRI, J. The Union of India [for short, 'the Revenue'] is in appeal against the judgement and order of the High Court at Allahabad in Civil Miscellaneous Writ Petition No. 1102 of 1995 passed on January 1, 1996.

D The short question that arises for consideration in this appeal is, whether the High Court is justified in quashing paragraphs (14) to (18) of the impugned show cause notice dated June 30, 1995.

E The facts giving rise to this appeal may briefly be noted.

F The respondent-assessee manufactures aluminium and its products. The goods manufactured by the assessee were cleared on the basis of valuation under Section 4(1)(a) of the Central Excise Act, 1944 for short, 'the Act' during the period 1990-91. On June 30, 1995, the Revenue issued show cause notice purporting to be under Section 11-A of the Act demanding duty in a sum of Rs. 45. 98 crores on the allegation that due to clandestine removal of the goods and incorrect valuation of the goods, there has been non-levy and short-levy of the excise duty. The assessee, without replying to the show cause notice, challenged the same before the High Court in the afore-mentioned writ petition on November 24, 1995. Insofar as paragraphs (1) to (13) of the show cause notice which related to the clandestine removal of the goods are concerned, the High Court dismissed the writ petition, the assessee was directed to submit its reply within thirty days thereof and the Revenue was directed to decide the matter by a speaking order. There is no appeal by the Revenue on that aspect.

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In regard to that part of the show cause notice which relates to valuation of the goods, mentioned in paras (14) to (18), the High Court took the view that no inquiry could be made by the appellant with regard to the aspects stated thereunder. Thus, the writ petition was disposed of on January 1, 1996. It is that order of the High Court which is assailed before us in this appeal. A

Mr. T.L.V. Iyer, learned senior counsel appearing for the Revenue, contends that this Court has deprecated the practice of entertaining writ petitions at the stage of show cause notice and, therefore, the High Court ought not to have decided the case on merits at the stage of the show cause notice. He further contends that, in any event, once it is found that the authority had jurisdiction to issue show cause notice under Section 11-A of the Act, no writ of prohibition ought to have been issued in respect of the alleged incorrect valuation of the goods. B C

Mr. K.K. Venugopal, learned senior counsel appearing for the respondent, contends that in regard to valuation, it is the settled position, by a catena of decisions of this Court, that clause (b) of sub-section (1) of Section 4 cannot be invoked when the goods are sold in the wholesale trade and that they are to be valued under clause (a) of sub-section (1) on the basis of normal price thereof, therefore, the authority had no jurisdiction to issue the notice and the High Court has rightly issued the prohibition in regard thereto. His further submission is that if two causes are clubbed in one notice, one without jurisdiction and the other with jurisdiction, the writ petitioner cannot be denied remedy in the other cause on the sole ground that in one cause the authority was held to have jurisdiction in the matter. D E

Section 11-A of the Act, *inter alia*, empowers a Central Excise Officer to serve a notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid to show cause why he should not pay the amount specified in the notice. F

Section 4 of the Act is the charging section. Insofar as it is relevant for our purpose, it reads as under: G

“4. Valuation of excisable goods for purposes of charging of duty of excise. (1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to value, such value shall, subject to the other provisions of this section be deemed to be— H

A (a) the normal price thereof, that is to say, the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place, of removal, where the buyer is not a related person and the price is the sole consideration for the sale:

B Provided that—

(i) to (iii) xxx xxxxxx

C (b) Where the normal price of such goods is not ascertainable for the reason, that such goods are not sold or for any other reason, the nearest ascertainable equivalent thereof determined in such manner as may be prescribed.

(2) and (3) xxx xxxxxx

D (4) For the purposes of this section,—

(a) 'assessee' means the person who is liable to pay the duty of excise under this Act, and includes his agent; or

(b) 'place of removal' means—

E (i) a factory or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty,

(ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty,

F from where such good are removed;

(c) xxx xxx xxx

(d) 'value' in relation to any excisable goods,—

G (i) where the goods are delivered at the time of removal in a packed condition, includes the cost of such packing except the cost of the packing which is of a durable nature and is returnable by the buyer to the assessee.

H *Explanation.* —In this sub-clause, 'packing' means the wrapper,

container, bobbin, prin, spool, reel or warp beam or any other thing A
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 B
other taxes, if any, payable such goods and subject to such rules as
may be made, the trade discount (such discount got 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".

A plain reading of clause (a) of sub-section (1) of Section 4 shows that C
if the duty of excise is chargeable on any excisable goods with reference to
value, such value, subject to the provisions of this section, is deemed to be
the normal price thereof which is elucidated to mean, the price at which such
goods are ordinarily sold by the assessee to the buyer in the course or wholesale
trade for delivery at the time and place or removal where the buyer is not a
related person and the price is the sole consideration for the sale. We are not D
concerned with the provisos thereto. Clause (b) thereof says that where the
normal price of such goods is not ascertainable for the reason that such goods
are not sold or for any other reason the nearest ascertainable equivalent
thereof determined in such manner as may be prescribed. For determination
of the value under clause (b), Rules 1 to 7, of the central Excise Valuation E
Rules, 1975 apply. It is, thus, clear that where duty of excise is chargeable
on the excisable goods with reference to value, the normal price at which the
goods are ordinarily sold to a buyer by the assessee in the course of wholesale
trade for delivery at the time and place of removal will be the measure of
charge. This is subject to (i) the buyer is not the related person and (ii) the
price is the sole consideration for sale. The question of determination of the F
nearest ascertainable equivalent thereof would arise where the normal price
of such goods is not ascertainable either because (a) such goods are not sold
or (b) for any other reason like the normal price being incorrectly represented,
etc. Admittedly, in this case, all the requirements of clause (a) are fulfilled;
the buyer is not a related person and this is a common ground that the price
is the sole consideration for sale. The goods in question are, therefore, G
assessable to excise duty with reference to the normal price at which such
goods are ordinarily sold by the assessee to a buyer in the course of wholesale
trade for delivery at the time and place of removal.

In the instant case, it is not pointed out to us that there is anything to H

A suggest in paragraphs (14) to (18) that either the buyer was a related person or that the price was not the sole consideration or there was other vitiating circumstance to doubt the normal price of the wholesale trade. If that be so, recourse to clause (b) of sub-section (1) of Section 4 could not be had. We have so held in Civil Appeal No. 9140 of 1996 on March 27, 2003. It is not disputed that the allegations contained in paragraphs (14) to (18) proceed on the basis as if the valuation of the goods ought to be under clause (b) ignoring the provision of clause (a) of sub-section (1) of Section 4. There being no valid foundation for ignoring the price under clause (a) of sub-section (1) of Section 4, the authority lacks jurisdiction to issue notice calling upon the assessee to show cause in the matter.

C There can be no doubt that in matter of taxation, it is inappropriate for the High Court to interfere in exercise of jurisdiction under Article 226 of the Constitution either at the stage of show cause notice or at the stage of assessment where alternative remedy by way of filing a reply or appeal, as the case may be, is available but these are the limitations imposed by the courts themselves in exercise of their jurisdiction and they are not matters of jurisdictional factors. Had the High Court declined to interfere at the stage of show cause notice, perhaps this court would not have been inclined to entertain the special leave petition; when the High Court did exercise its jurisdiction, entertained the writ petition and decided the issue on merits, we do not think it appropriate to upset the impugned order of the High Court under Article 136 of the Constitution on a technical ground.

F The second contention urged by Mr. T.L.V. Iyer is that under Section 11-A, the authority did have power and the High Court had itself found in regard to paragraphs (1) to (13) and directed inquiry in respect of the clandestine removal of the goods. The assessee could have been directed to file a reply in regard to the matters concerning the incorrect valuation and the High Court ought not to have interfered. We are unable to accept the contention of the learned counsel for reasons more than one. First, as submitted by Mr. K.K. Venugopal, if an authority which has jurisdiction in regard to one aspect takes upon itself to make enquiry into a matter in respect of which it had no jurisdiction then merely because in regard to one aspect it has jurisdiction, the court cannot ignore the fact of lack of jurisdiction and allow the Tribunal to proceed with the matter in respect of which it has no jurisdiction to make inquiry. Secondly, the position, stated above, namely, that valuation once accepted under clause (a) and there being no vitiating factor, no recourse can be had to valuation under clause (b) is a settled position of law. Therefore,

at this stage, if the party is directed to go back to the authority, it would be directing it to undergo a futile exercise. A

For these reasons, we find no merit in the appeal. The civil appeal is dismissed but in the facts and circumstances of the case, we make no order as to costs.

K.K.T.

Appeal dismissed. B