A KIRLOSKAR BROTHERS LTD.

v.

COMMISSIONER OF CENTRAL EXCISE, PUNE.

MARCH 7, 2005

B [RUMA PAL, ARIJIT PASAYAT AND C.K. THAKKER, JJ.]

Central Excise Act, 1944, Sections 4(1)(a) clause (i) of the proviso, 2(k), 4(4)(e)—Class of buyers—Charging of lesser price from bulk buyers—
C *Permissibility of —Held : For charging lesser price from different buyers, assessee is required to establish that discount allowed and lesser price charged was in accordance with normal practice and founded on some rational basis—Assessee having failed to show rational and commercial consideration to distinguish bulk buyers from other wholesale buyers, charging of lower price held not permissible.*

D

Assessee filed two price lists, one in Part-I and other in Part-II for same 'kind of product', showing a lesser price for sales to bulk buyer. Revenue authorities issued notice rejecting the lower price on the ground that the bulk buyers cannot be distinguished from other wholesale buyers and there cannot be more than one price for the same class of buyers.
E **Assistant Collector confirmed proposal contained in the notice. Collector (Appeals) however held in favour of assessee. Revenue preferred appeal before CEGAT, which held that there is no rational or commercial consideration to distinguish the bulk buyers from any other buyers. Aggrieved assessee preferred the present appeal.**

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Dismissing the appeal, the Court

HELD: 1. Where the goods are sold to different class of buyers at different price, then assessee is required to establish that discount allowed and the lesser price charged was in accordance with normal practice of
G **the wholesale trade in such goods. One or two instances cannot be termed as the normal practice of the wholesale trade. It essentially depends upon the number of person engaged in such trade. In the instant case, the assessee has not placed on record the number of persons engaged in the wholesale trade. [573-A, B, C]**

H

Metal Box India Ltd. **v.** *Collector of Central Excise, Madras* **[1995] 2 SCC 90 and** *Gora Mal Hari Ram Ltd.* **v.** *Collector of Central Excise, Delhi* **1994(69) ELT 269, referred to.** A

2.1. Classification can be made on the basis of region depending upon the quantum of turnover in a particular region and special factors relatable to that region. It cannot be said that the discount should be uniform in all circumstances in all categories of buyers all over the country. But discount has to be as per the normal practice of the wholesale trade in such goods and the discount cannot be given on extraneous considerations and has to be founded on some rational basis. [573-E] B

2.2. There may be cases, where in a particular region there is a scope for increasing the turnover by giving incentive to some. But there must be some intelligible criteria for treating the benefited persons differently from others. Comparison may be made intra-region and not by taking all regions together. The assessee has not shown the justification for wide variation within the same region, and has failed to establish rational basis for selecting the persons. On considering the relevant factors, the authorities and CEGAT have rightly recorded finding of fact that no rational basis has been established. [573-G, H; 574-B] C D

Collector of Customs, Bombay **v.** *Swastic Wollens (P) Ltd. and Ors.,* **[1988] Supp. SCC 796;** *West Bengal Electricity Regulatory Commission* **v.** *CESC Ltd.,* **[2002] 8 SCC 715;** *Commissioner of Customs, Chennai* **v.** *Adani Exports Ltd. and Anr.,* **[2004] 4 SCC 367 and** *Commissioner of Customs, Mumbai* **v.** *M/s Bureau Veritas and Ors.,* **JT (2005) 2 SC 348, relied on.** E

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6938 of 1999. F

From the Judgment and Order dated 28.9.99 of the Central Excise, Customs and Gold (Control) Appellate Tribunal, Western Regional Bench at Mumbai in F.O. No. C-I/2444/WRB/1999 in A. No. E/2559 of 1994-A.

Akhil Sibal, Rajan Sheth, Ms. Ruby Singh Ahuja, Ms. Nandini Gore, Ms. Saloni Gupta, Ms. Kanika Agnihotri and Mrs. Manik Karanjawala for the Appellant. G

K. Swami and B. Krishna Prasad for the Respondent.

The Judgment of the Court was delivered by H

A **ARIJIT PASAYAT, J.** Appellant calls in question legality of the judgment rendered by the West Regional Bench at Mumbai of the Customs Excise and Gold (Control) Appellate Tribunal (in short the 'CEGAT').

The factual position giving rise to the controversy is as follows:

B The appellant (also described as 'assessee') had filed a price list in Part I of the Format prescribed for determination of value under Section 4 of the Central Excise and Salt Act, 1944 (in short the 'Act') for the compressors manufactured by it. It also filed price list in Part II for the same kind of compressors showing a lesser price of Rs. 150 of assessable value per compressor than in the Part I price list for sales to alleged bulk buyers. C Notice was issued proposing disallowance of the lower price on the ground that the bulk buyers did not constitute a different class of buyers and cannot be distinguished from other wholesale buyers; there cannot be more than one price for the same class of buyers. In the notice it was alleged that the claim for lower price on the ground that the bulk buyers purchased a substantial D quantity had not been justified. The Assistant Collector declined to accept the assessee's contention that the price was on account of the fact that the bulk buyers constituted a different class because of the quantity of compressors that they purchased and higher purchases in the past than other buyers. He confirmed the proposal in the notice.

E On appeal by the assessee, the Collector (Appeals) accepted the contention of the assessee that the bulk buyers were a different class and that the lower price was permissible.

An appeal was preferred by the present-respondent questioning correctness of the order of the Collector (Appeals). Stand of the Revenue was F that normal price applicable to wholesale dealer should be made applicable to the so-called bulk buyers and the Collector (Appeals) erred in concluding that there can be more than one class of dealers. CEGAT by the impugned judgment held that there can be different class of buyers. While it is open to the assessee to classify buyers according to commercial consideration, the G classification has to be rational and identifiable based on commercial consideration and it cannot be arbitrary. According to the CEGAT it is not possible to see the existence of any rational or commercial consideration to distinguish the bulk buyers from any other buyers. The existence of any relationship with a customer to prove business consideration was also not established.

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Accordingly, Revenue's appeal was allowed. A

In support of the appeal, learned counsel for the appellant submitted that CEGAT has missed the most relevant factor that the Revenue's case was not that any extra commercial consideration existed so far as the present appellant is concerned. That being so, the presumption is that the price fixed was rational and the Collector (Appeals) had rightly decided in favour of the B appellant. The beneficiaries were clearly identifiable. The names of the persons belonging to different regions were noted. Taking into account the previous periods' turnover, the price concession was given. The authorities were clearly in error by observing that classifications cannot be made on regional basis. The comparison of the sales figures has been made by the authorities and C CEGAT by taking all the regions together and not inter-zones. Merely because no minimum number of sales was indicated while deciding the persons to whom concession is to be given, that does not *per se* make the claim irrational. Reliance was placed on *Metal Box India Ltd.* v. *Collector of Central Excise, Madras,* [1995] 2 SCC 90 to submit that even a single individual whose transactions were considerable can constitute a class for granting discount. D As discount was not based on any extra commercial consideration it was deductible in terms of Section 4(1)(a) (proviso) (i) of the Act. Reference was also made to a decision of the Special Bench of CEGAT, New Delhi in *Gora Mal Hari Ram Ltd.* v. *Collector of Central Excise, Delhi* (1994) 69 ELT 269 to contend that where there is a rational differentia based on valid commercial E consideration which has been established, the Revenue cannot refuse to recognize the same unless it is established that the transactions were not at arm's length and in the usual course of business. It was further submitted that the dealers as referred to in Section 4(4)(c) of the Act do not constitute a class different from other buyers as noted in the definition of "wholesale trade". The Revenue Authorities were not justified in holding that the dealers F constituted a class and there cannot be class within the class. To justify its claim that grant of such discount was a normal trade practice, the price-list of another manufacturer M/s Sriram Refrigeration Industries Ltd., Hyderabad, was filed with all relevant details. CEGAT came to an incorrect conclusion that the details were not filed.

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In response, Mr. K. Swami, learned counsel for the respondent submitted that mere absence of any extra commercial considerations does not per se entitle an assessee to the benefit in terms of Section 4(1)(a) (proviso) unless an intelligible rationale for choosing differently between different groups of buyers is established. The assessee was granted an opportunity to justify the H

A ground for granting discount to the named persons. Except stating that the management had taken a decision in that regard, no other material was placed for consideration. It was, therefore, contended that the Revenue Authorities and the CEGAT were justified in rejecting claim made by the assessee-appellant.

B We are concerned with clause (i) of the proviso to Section 4(1)(a). The relevant provision reads as under:

> "Section 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
C shall, subject to other provisions of this section, be deemed to be -
>
> (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 a 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
D consideration for the sale:
>
> Provided that -
>
> (i) where, in accordance with the normal practice of the wholesale trade in such goods, such goods are sold by the assessee at different
E prices of different classes of buyers (not being related persons) each such price shall, subject to the existence of the other circumstances specified in clause (a), be deemed to be the normal price of such in relation to each such class of buyers."

The expression "wholesale dealer" is defined in Section 2(k). Section
F 4(4)(e) defines "wholesale trade" and the same reads as under:

> "Wholesale trade" means sales to dealers, industrial consumers, Government, local authorities and other buyers, who or which purchase their requirements otherwise than in retail."

G In order to get benefit of Section 4(1)(a) (proviso) (i) the assessee has to establish that discount claimed was in accordance with the normal practice of wholesale trade in the concerned goods sold to different classes of buyers, and it shall be subject to the existence of other circumstances specified in clause (a). Such circumstances are: (a) Charging of normal price at which
H such goods are ordinarily sold; (b) sale must be to a buyer in the course of

wholesale trade; (c) the sale must be in the wholesale trade for delivery at the place and time of removal; (d) the buyer is not a related person; and (e) the price is the sole consideration for the sale. In order to show that the goods are sold to different class of buyers in accordance with normal practice it has to be established that same was the normal practice of the wholesale trade in such goods. One or two instances cannot be termed as the normal practice of the wholesale trade. It essentially depends upon number of persons engaged in such trade. By way of illustration it can be said that if out of ten dealers engaged in the wholesale trade in the concerned goods only two give discount while others do not it cannot certainly be normal practice of the wholesale trade in such goods. It would depend upon the question whether majority of the persons engaged in the wholesale trade grant such discount. The question has to be adjudicated on the factual premises. In the instant case the assessee-appellant has not placed on record the number of persons engaged in the wholesale trade.

We need not go into the broader question as to whether the "dealers" referred to in clause (e) of Section 4(4) only refers to those who buy in bulk for trading and whether the bulk purchasers constitute a different class amongst the class of buyers as referred to in Section 4(4)(e).

It is true, classification can be made on the basis of region depending upon the quantum of turnover in a particular region and special factors relatable to that region. It cannot be said that the discount should be uniform in all circumstances in all categories of buyers all over the country. But discount has to be as per the normal practice of the wholesale trade in such goods and the discount cannot be given on extraneous considerations and has to be founded on some rational basis.

The expression "rational" means as per The Law Lexicon, Second Edition 1997, "endowed with reasons".

The expression "Irrational" means as per The Law Lexicon, Second Edition 1997, illogical not endowed with reason, insane.

There may be cases, where in a particular region there is a scope for increasing the turnover by giving incentive to some. But there must be some intelligible criteria for treating the benefited persons differently from others. It is true that comparison can or may be made intra-region and not by taking all regions together. But even then the appellant has not shown the justification for wide variation within the same region. For example, in region where

A transactions are substantial i.e. Delhi the variation is between 546 and 1523. Similar is the position in Ahmedabad Zone where the variation is between 414 and 1541. In Madras Zone it varies between 52 to 368. No reason was indicated as to why the named persons were chosen. Even though it is open to the assessee to chose the persons, it cannot be left to its ipse dixit. No rational basis for selecting the persons was established. On considering the B relevant factors, the authorities and CEGAT have recorded finding of fact that no rational basis has been established.

The scope for interference with findings recorded by the Tribunal if it has kept in view the correct legal position, has been dealt with by this C Court in many cases. The position was illuminatingly stated by this Court in *Collector of Customs, Bombay* v. *Swastic Woollens (P) Ltd. and Ors.*, [1988] Supp. SCC 796 as follows:

"9. The expression "wool wastes" is not defined in the relevant Act or in the notification. This expression is not an expression of art. D It may be understood, as in most of financial measures where the expressions are not defined, not in a technical or preconceived basis but on the basis of trade understanding of those who deal with these goods as mentioned hereinbefore. The Tribunal proceeded on that basis. The Tribunal has not ignored the Technical Committee's observations. We have noted in brief the Tribunal's handling of that E report. The Tribunal has neither ignored the observations of CCCN nor the Board's Tariff Advice. These observations have been examined in the light of the facts and circumstances of the case. One of the basis factual disputes was long length of sliver tops. Having regard to the long length, we find that the Tribunal was not in error. Whether F a particular item and the particular goods in this case are wool wastes, should be so considered or not is primarily and essentially a question of fact. The decision of such a question of fact must be arrived at without ignoring the material and relevant facts and bearing in mind the correct legal principles. Judged by these yardsticks the finding of the Tribunal in this case is unassailable. We are, however, of the view G that if a fact finding authority comes to a conclusion within the above parameters honestly and *bona fide*, the fact that another authority be it the Supreme Court or the High Court may have a different perspective of that question, in our opinion, is no ground to interfere with that finding in an appeal from such a finding. In the new scheme H of things, the Tribunals have been entrusted with the authority and

the jurisdiction to decide the questions involving determination of the rate of duty of excise or to the value of goods for purposes of assessment. An appeal has been provided to this Court to oversee that the subordinate tribunals act within the law. Merely because another view might be possible by a competent court of law is no ground for interference under Section 130-E of the Act though in relation to the rate of duty of customs or to the value of goods for purposes of assessment, the amplitude of appeal is unlimited. But because the jurisdiction is unlimited, there is inherent limitation imposed in such appeals. The Tribunal has not deviated from the path of correct principle and has considered all the relevant factors. If the Tribunal has acted *bona fide* with the natural justice by a speaking order, in our opinion, even if superior court feels that another view is possible, that is no ground for substitution of that view in exercise of power under clause (b) of Section 130-E of the Act."

The position was reiterated in *West Bengal Electricity Regulatory Commission* v. *CESC Ltd.*, [2002] 8 SCC 715, *Commissioner of Customs, Chennai* v..*Adani Exports Ltd. and Anr.*, [2004] 4 SCC 367 and recently in *Commissioner of Customs, Mumbai* v. *M/s Bureau Veritas and Ors.*, JT (2005) 2 SC 348.

Above being the position, we find no merit in this appeal which is accordingly dismissed with no order as to costs.

D.G. Appeal dismissed.