COLLECTOR OF CENTRAL EXCISE, MADRAS

v.

INDIAN OXYGEN LTD.

AUGUST 2, 1988

[SABYASACHI MUKHARJI AND L.M. SHARMA, JJ.]

Central Excises And Salt Act, 1944: Section 4(1)(a) and 35L(b)— Manufacturer of dissolved acetylene gas and compressed oxygen gas— For purposes of supply—Rental Charged for cylinders—Interest paid on deposits taken from customers—Charges on account of rental and interest on deposits—Whether relatable to cost of 'manufacture'.

The respondent firm are manufacturers of dissolved acetylene gas and compressed oxygen gas. They were supplying these gases in cylinders at their factory gate. For taking delivery some consumers/ customers used to bring their own cylinders and take the delivery. Others, used to have the delivery in the cylinders supplied by the respondent firm. For the purpose of such supply of cylinders certain rentals were charged by the firm, and also to ensure that these cylinders are returned, a certain amount as deposit used to be taken from the customers. On these deposits notional interest at 18 percent per annum was calculated.

The Central Excise Authorities issued show-cause notices to the respondent on the ground that the notional income on the deposit of cylinders and the rental are part of the assessable-value, and hence should be included in computing the assessable value. In their reply the respondent stated that the deposits from the buyers were only to ensure return of the gas cylinders from the customers.

The Assistant Collector by his order dated 3rd June, 1965 held that the respondent had to pay excise duty on the interest earned at 18% during the relevant period, and that as the respondent had suppressed this fact from the revenue during the past 5 years, the amount was includible and recoverable under Rule 8 read with Section 11A of the Central Excises and Salt Act. He also included the rentals of the cylinders in the value.

In appeal the Collector upheld the order of the Assistant Collector but with certain modifications.

A The respondent appealed to the Central Excise and Gold Control Appellate Tribunal, which allowed the appeal, and held that the charge on account of rentals for the cylinders and the interest which accrued on the deposit for the cylinder are not relatable to the cost of manufacture of the goods, and therefore under Section 4 deleted from the value, rentals for the cylinders and the interest on the deposit.

B

In the appeals to this Court it was contended on behalf of the Revenue that there are two different classes of buyers, one class who brings their own cylinders, and the others who get their supply through the cylinders of the suppliers, and that different rates for these two classes of buyers constitute two different markets and are contemplated and permissible, under the first proviso to Section 4(1)(a) of the Act.

C

Dismissing the Appeals,

HELD: 1. Section 4(1)(a) proviso can be of no avail to the Revenue. There may be different classes of buyers for different classes D of goods. In the instant case, if the respondent company sold the gases to different classes of buyers then different prices may be charged. If the gases had been sold to different classes of buyers at different rates, it is possible that there might be different markets for the same. The charges like rental for the cylinders and the notional interest income are for ancillary or allied services and that is not an activity of manu- E facture. [766A-B]

Union of India & Ors. v. *Bombay Tyre International Ltd.*, [1984] 1 SCR 347 and *Asstt. Collector of Central Excise* v. *Madras Rubber Factory Ltd.*, [1986] Supp SCC 751, referred to.

F 2. It is well settled that levy under the Central Excises Salt Act is on manufacture. In the instant case, the sale is of gases. The levy is on the manufacture of gases and the excisable goods are these gases. [764G, H]

3. Gas being a commodity of peculiar nature, has to be delivered by cylinders, but these cylinders might be supplied either by the sup- G plier as an ancillary activity or brought by the consumers or purchasers at their own risk and cost. For purchasers taking it in their own cylinders supplied by them, there was no charge for them. This is not an activity for the manufacture of gases. This is ancillary to it but not incidental. [765C]

H In the instant case, there are two different supplies. One is supply

of gases and the other is an incidental supply of cylinders on rent. The interest notional or real accruing on deposits for the safe return of cylinders as well as the rental would not constitute part of the assessable-value. The Tribunal was right in the view it took. [766C-D]

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 2349-61 of 1988.

From the Order dated 8.7.1987 of the Customs Excise and Gold Control Appellate Tribunal, New Delhi in Appeal Nos. E/1583 to 1589/86-A and 1533, 1521, 1528, 1529-31/1986-A and Order No. 491 to 503 of 1987.

A.K. Ganguli, Mrs. Indu Malhotra and Mrs. Sushma Suri for the Appellant.

Soli J. Sorabji, M. Chandrasekharan Mrs. V.J. Francis and N.M. Popli for the Respondent.

The Judgment of the Court was delivered by

SABYASACHI MUKHARJI, J. These appeals are under Section 35L(b) of the Central Excises & Salt Act, 1944 (hereinafter called 'the Act') directed against the decision of the Customs Excise (Gold) Control Appellate Tribunal, New Delhi, (hereinafter called 'the CEGAT').

The respondent M/s. Indian Oxygen Ltd., Visakhapatnam, are manufacturers of dissolved acetylene gas and compressed oxygen gas (hereinafter called 'the gases'). The respondent was supplying these gases in cylinders at their factory gate. For taking delivery of these gases, some consumers/customers used to bring their own cylinders and take the delivery, while others used to have the delivery in the cylinders supplied by the respondent. For the purpose of such supply of cylinders, certain rentals were charged by the respondent and also to ensure that these cylinders are returned properly, certain amount of deposit used to be taken from the customers. On those deposits notional interest @ 18% per annum was calculated. These two amounts with which we are concerned, namely, the rentals of the cylinders and the notional interest earned on the deposit of cylinders, are the subject-matters of the dispute herein. Whether these two amounts were includible in the value under Section 4 of the Act, is the question. The revenue's case is that the notional income on deposit of

A cylinders and the rental are part of the asessable-value and, hence, should be included in computing the assessable-value. The respondent, however, disputed that. They had neither included such rentals nor the interest received from the buyers in the price list for the assessment. Therefore, the revenue issued show-cause notices to the respon-
B dent. In their reply the respondent stated that the deposits from buyers were only to ensure return of the gas clinders from the customers.

The Asstt. Collector Central Excise, Visakhapatnam, by an order dated 3.6.1965 held that the respondent had to pay excise-duty on the interest earned @ 18% during the relevant period. He further held that since the respondent had suppressed this fact from the
C revenue, in the past 5 years, under Rule 8 read with Section 11A of the Act, these are includible. He also included the rentals of these cylinders in the value. On an appeal, the Collector of Central Excise, Madras, upheld the said order with certain modifications.

D Dissatisfied with the aforesaid, the respondents appealed to the CEGAT. In its order under appeal, the Tribunal observed, *inter alia*, as follows:

> "As regards charge on account of rental for the cylinders and the interest which accrues on account of deposit re-
E ceipts for the supply of gases in returnable cylinders, we are not persuaded that either of these charges is related to the cost of manufacture of the goods as such."

The Tribunal, therefore, under Section 4 deleted from the value, rentals for the cylinders and interest which accrued on account of
F deposit receipts for the supply of gases. Hence, this appeal by the Collector.

It is well-settled that the levy under the Act, is on the manufacture. Under Section 4(1)(a) of the Act, excise-duty is chargeable on any excisable goods with reference to value, such value shall, subject
G to the other provisions of this Section, be deemed to be 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. Here the sale is of the gases. The levy is on the manufacture of gases and the
H excisable goods are these gases.

The scope of Section 4 has been explained by this Court in *Union of India & Ors.* v. *Bombay Tyre International Ltd.*, [1984] 1 SCR 347 as well as the ramifications thereof in *Asstt. Collector of Central Excise* v. *Madras Rubber Factory Ltd.*, [1986] Supp SCC 751. In the light of the aforesaid principles it has to be borne in mind that the supply of gas cylinders is ancillary to the supply of gases but it is strictly not incidental thereto because there are classes of persons who can take delivery of these gases without supply of cylinders by the respondent and in those cases no question of charging rental nor interest on those deposits for cylinders, would arise. It is true that the gas being a commodity of peculiar nature, had to be delivered in cylinders but these cylinders might be supplied either by the supplier as an ancillary activity or brought by the consumer or purchasers at their own risk and cost. For purchasers taking it in their own cylinders supplied by them, there was no charge for them. This is not an activity for the manufacture of gases. This is ancillary to it but not incidental. Any income either in the shape of interest on deposits, notional or real, may be earned on the deposit for the safe return of cylinders, or any rental would be though ancillary but would not be the price for the manufacture. These might be profits or gains, if any, of any ancillary or allied venture. If that is the true position, then on the principle under Section 4(1)(a) of the Act, the Tribunal was right in excluding these two amounts while computing the value of the excisable goods.

Mr. A.K. Ganguli, learned counsel appearing for the revenue, sought to urge before us that there are two different classes of buyers, one class of such buyers was who used to bring their own cylinders and the others used to get their supplies through the cylinders of the suppliers. According to him, different rates for these two classes of buyers, in fact, constitute two different markets and are permissible. This, according to him, is contemplated under the first proviso to Section 4(1)(a) of the Act, which reads as follows:

> "(i) where, in accordance with the normal practice of the wholesale trade in such goods, such goods are sold by the assessee at different prices to 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 goods in relation to each such class of buyers."

There may be different classes of buyers for different classes of goods. Section 4(1)(a) of the Act emphasises that if the goods is of the

A same type, the prices should also be the same. The proviso to the said Section postulates that where in accordance with normal practice such goods, namely, the gases are sold to different classes of buyers then different prices may be charged. If gases had been sold to different classes of buyers at different rates, it is possible that there might be
B different markets for the same. But here the charges like rentals for the cylinders and the notional interest income, are for ancillary or allied services and that is not an activity of manufacture. Hence, Section 4(1)(a) proviso can be of no avail to the renenue.

It is a case of two different supplies. One is supply of gases and the other is incidental supply of cylinders for rent. In that view of the
C matter, in our opinion, the Tribunal was right in the view it took. The interest, notional or real, accruing on deposits for the safe return of cylinders as well as the rentals would not constitute part of the assessable-value.

D In the aforesaid view of the matter the order of the Tribunal needs no interference. The appeals, accordingly, fail and are dismissed. There will be no order as to costs.

N.V.K. Appeals dismissed.