

Collector of Central Excise Vs. Bharat Earth Movers Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Oct-17-1985

Reported in : (1986)(6)LC212Tri(Delhi)

Appellant : Collector of Central Excise

Respondent : Bharat Earth Movers Ltd.

Judgement :

1. The present proceedings were initiated by Government of India by means of a Review Notice, dated nil, in exercise of the power under Section 36(2) of the Central Excises and Salt Act, 1944, as it then existed. The said notice stood transferred "to the Tribunal under Section 35P(2) of the Act to be disposed of as if it were an appeal filed before it. The Review Notice is, accordingly, being disposed of as an appeal filed by the Central Government. The date of the notice, according to the reply of the respondent herein dated 22-12-1980, is 6-9-1980.

3. The respondents are a Government Company manufacturing earth moving machinery and vehicles including Haulpak Rear Dump and Tractor Rear Dump. The Superintendent issued a demand on 7-8-69 covering 56 Rear Dump and 15 LW 35 Haulpak for duty amounting to Rs. 72,42,685.91. On this an adjudication was made and the Deputy Collector confirmed the demand. The respondents challenged the order before the Karnataka High Court in Writ Petition 813 of 1971. The Hon'ble High Court of Karnataka in their Order dated 21-11-74 held that excise duty levied under Item 34 of the First Schedule to the Central Excises and Salt Act has no application to a motor vehicle which is not suitable for use on

public roads. The Court also held that the Deputy Collector did not go into the question whether or not Haulpak Rear Dump and Tractor Rear Dump are suitable for being used upon public roads. The order was held unsustainable. The Deputy Collector was directed to examine the question and then to decide afresh whether these two types of vehicles are exigible to excise duty. Paragraph 17 of the judgment is as follows : "In case the Deputy Collector holds that these two types of vehicles are adapted for use upon public roads, and hence come within the ambit of Item No. 34 the First Schedule to the Central Excise Act, he should further examine whether any parts of these two types of vehicles should not be taken into account for the purpose of that item, as provided in the explanation to that item." The Deputy Collector in his order dated 29-10-76 confirmed the demands raised by the Superintendent and also held that the equipments were classifiable under T.I. 34. On revision, the Government of India remanded the case back to the Appellate Collector stating that the Deputy Collector had no appellate powers. The impugned order was passed by the Appellate Collector on 17-9-79 allowing the appeal of the respondents. The review notice has been issued by the Government of India under Section 36 (2) of the Central Excises and Salt Act, as it then existed, against the impugned order.

4. In the show cause notice it is stated that in their decision the High Court of Delhi in the case of Hindustan Motors Ltd. v. Union of India and Ors. [1980 E.L.T. 423 (Del.)] have held that "the epithet 'off the highway' used in relation to 'rear motors' will not take the vehicle out of the category of motor vehicles." In coming to this conclusion the Delhi High Court has relied on judgment of the Supreme Court in Bolani Ores v. State of Orissa [AIR 1975 (S.C.) 17]. According to the Government the ratio of the judgment of the Delhi High Court would equally apply to the assessee's case and that the impugned goods would appear to attract central excise duty under Item 34 of the First Schedule to the Central Excises and Salt Act as it stood at the material time.

5. The parties are at issue on the question whether Rear Dumpers and Haulpak Rear Dumpers manufactured by the respondents would fall under T.I. 34 as it stood at the relevant time. Shri Lakshmikumaran, appearing for the Department, and Shri S.G. Sundaraswamy, the learned counsel, for the respondents, argued

elaborately on points regarding their respective contentions and cited several decisions in support of their case. We shall be dealing with the contentions in the course of the judgment. Before the actual controversy is considered, it would be better to extract the Tariff Entry as it stood at the relevant time.

Description of goods			Rate of duty	Item No.
vehicles, not Two thousand five otherwise specified.			4.	Motor

hundred rupees
each-----The

principles regarding interpretation of tariff entries are well settled. In 1983 E.L.T. 116 (Commissioner of Sales Tax v. Aggarwal & Co.) following the earlier Supreme Court decision held that the general term used for describing any commodity in any fiscal legislation, would cover that commodity or item or article in all its forms and varieties.

Terms under excise tariff item should be given the widest scope. In Western India Plywood v. C.C.E. Cochin-1985 (19) E.L.T. 590 (Tribunal) (Order No. 591/84-D dated 11-10-84) (CEGAT) in para 39 the same position has been reiterated. In that case the Tribunal has held that an article cannot be relegated to the residuary Item if it can be said to fall within the scope of a specific Item.

6. The goods in question are admittedly "mechanically propelled". A close scrutiny of the entry shows that all mechanically propelled vehicles adapted for use upon roads would come within the ambit of the term motor vehicles under the entry. What is expressly excluded under the entry is a vehicle running on fixed rails. The explanation to the entry makes the position clear. Where a motor vehicle is mounted with an earth moving and similar specialised material handling equipment, such equipment shall not be taken into account. So the explanation provides basis for the scope of the particular entry and explanation is an integral part of that entry.

7. In this case admittedly the Karnataka High Court has remanded the controversy to the assessing authorities on the question of classification. The Hon'ble

Karnataka High Court has observed in paragraph 15 as under : "It follows that excise duty levied under Item 34 of the First Schedule to the Central Excises Act, has no application to a motor vehicle which is not suitable for use on public roads." Paragraph 17 makes the position clear and envisages that types of vehicle adapted for use upon public roads would come within the ambit of the Item 34 of the First Schedule to the Central Excises Act. The entire controversy in this case therefore boils down to the question whether the goods in dispute are adapted for use upon public roads. If the answer is in the affirmative, the conclusion is inescapable that tariff item 34 would be attracted. Per contra, if these vehicles are not adapted for use upon public roads, then, the impugned order has to be upheld. This concept "adapted for use upon public roads" was the precise question in *Bolani Ores v. State of Orissa* (cited supra). In fact, even the Karnataka High Court has followed the Supreme Court decision in the matter between the parties. An SCLAP was filed by the Department against the decision in Writ Petition No. 813 of 1971 and that was dismissed holding that their Lordships have followed the observations of the Supreme Court in *Bolani* case and no substantial question of law would arise. In *Bolani Ores* case the term 'motor vehicle adapted for use upon roads' came up for scrutiny and it was held that the word 'road' in Section 2(18) of the Motor Vehicles Act would mean a public road and that a motor vehicle which is not adapted for use upon roads to which public have no right to access is not a motor vehicle within the meaning of that Act. In *Hindustan Motors Ltd. v. Union of India and Ors.*, (1980 E.L.T. 423) an identical question of rear dumpers and their exigibility under Item 34 of the First Schedule to the Central Excise Act was examined. Following the decision of the Supreme Court their Lordships of the Delhi High Court held that the manufacturer's description showed that the dumpers were designed for use on roads, of course at slower speed, because they have to carry great loads. Similar arguments as in this case were raised by both the parties and the Delhi High Court concluded that the definition of "Motor vehicle" as given in Item 34 would govern the issue and not what has been stated in other enactments or literature. Shri S.G.Sundaraswamy argued that the decision of the Delhi High Court would not apply to the present facts. We do not accept this contention because we see from the annexures to the show cause notice number of instances when the dumpers were driven on roads covering long distances.

Vehicles have been sent to Ahmadnagar, Balimala, Akola and Poona etc. Letters to other State authorities (Regional Transport Departments) further show that these dumpers were intended to transverse long distances by road.

This clinching factor shows that these dumpers are in fact adapted for use upon public roads.

8. A scrutiny of the manufacturers' pamphlet confirms that these dumpers have all the essential ingredients and equipment necessary for any mechanically propelled vehicle to run upon public roads. These vehicles operate on a transmission system for conveyance of power from the Engine to the wheels. A brake assembly has been provided for stopping the vehicle whenever required. The vehicles have tyres besides a steering system. The entire machinery is fixed on semi-elliptical leaf spring with shock absorbers. Accessories are also provided. The pamphlet for Haulpak Rear Dump 35 contains the following :- "Sturdy turbocharged Kirloskar Cummins diesel engine for sustained power and fuel economy.

Allison automatic powershift transmission with torque converter, eliminates operator's errors, automatically adjusts to varying loads faster giving minimum cycle time.

Dependable air-over-hydraulic wedge actuated shoe type service brakes. Full time hydraulic power steering. Emergency steering system is a standard fitment.

Unique Hydair II suspension on front and rear offers improved operator's comfort, increases tyre life, reduces shock loads on frame and body structures and eliminates heavy cumbersome leaf springs and front axle.

These factors prove that the goods have been so manufactured so that they may be suitable or adapted for use including on public roads.

9. The learned counsel for the respondents relied on the decision of *Burns v. Currell* [1963 (2) All E.R. page 297]. In that case the expression intended or adapted for use upon roads was examined. On facts it was held that there was no sufficient evidence to prove beyond reasonable doubt that any reasonable person looking at the Go-Kart would say that one of its uses would be a use on the road

nor that it was fit or apt for use on the road although it was capable of such a use. The evidence was that it had never been used on any public road.

But in that decision reference has been made to an observation by Saloman J. in MacDonald v. Carmichael. The observation is as follows :- "My conclusion might, and probably would, have been different if the findings had shown that the dumpers were reasonably suitable for being driven along the public roads in transit or for the purpose of carrying material from one site to another. Nor must it be thought that I am acceding to the appellants' submission that the intention referred to in the relevant sections is the manufacturer's intention alone. It may be that the legislature had no particular person's intention in view, whether manufacturer's, wholesaler's, retailer's, owner's or user's. 'Intended...for use on roads' my mean no more than suitable or apt for use. I prefer, however, to express no concluded view on this point but to base my decision, following MacDonald v. Carmichael (2), on the ground that in no event does the evidence of very limited user in this case establish that the vehicles were intended for use on roads within the meaning of the statutes concerned." The above observation indicates that if the dumpers were reasonably suitable for being driven along the public roads, even in transit, it would have been held that they were intended or adapted for use on the road. The learned counsel for the respondent also relied on the decision Maddox v. Storer reported in 1962 (1) All E.R. Page 831. That decision only confirms that the term 'adapted' means 'fit and apt for the purposes'. In 1978 TLR 2242 (Chowgule and Co. v. M.R. Patil) the dumpers and shovels were used solely on the premises of the owner. The Goa, Daman and Diu, J.C's Court held that the use of the motor vehicle on road was a condition sine qua non for the payment of taxes and motor vehicles not using public roads cannot be taxed under any Act made under Entry 57 of List II of the Seventh Schedule. Further, the respondents therein conceded that the dumpers and shovels were not actually used on the roads. Under these circumstances this decision will have no application on the present facts.

10. Shri Lakshmikumaran urged that roads under Central Excise Item 34 would not only refer to highways but also pioneer roads, farm roads, haul and logging roads, etc. According to him roads can be highways or even kacha roads. If the public have an access to such roads then tariff Item 34 would be attracted.

Admittedly, the dumpers herein were used in mining areas and also on public highways for transport from the place of manufacture to the place of delivery. It is also well settled that the end use of a particular vehicle cannot be taken into consideration for the purpose of determination of tariff entry unless the entry itself prescribes such a user. In 1985 (19) ELT 122-Vipul Shipyard v. Collector of Central Excise, Bombay) the Tribunal had to consider the term 'ocean going vessels' occurring in Schedule to Notification 55/75-CE dated 1-3-75 (as amended) in respect of Tariff Item 68. It was held that if the vessels are ocean going vessels designed and constructed for such purposes then they were qualified for the exemption. Applying the principles of that ruling to the present fact it is manifest that the goods in dispute have been designed, constructed and adapted for use upon public roads. The end-use namely of its pre-dominant use in mining areas will have little relevancy in determining the classification.

11. We also notice that Central Excise authorities have issued a notification under Tariff Item 39 regarding motor vehicles exempting totally the duty leviable on off the highway dumpers effective from 28-2-79. Secondly, the respondents herein have availed this exemption in respect of the subject goods. Notification No. 68/83 dated 1-3-83 also exempts off the highway dumpers in Tariff Item 34 in excess of 10% ad valorem. These subsequent notifications would be rendered redundant and nugatory if a contrary interpretation is placed on the tariff item.

We are inclined to accept the Department's case in view of this factor also.

12. We also find that in Writ Petition No. 145/78 the Bombay High Court in Salgaocar Engineers v. Union of Indian and Ors. have observed "In fact, though it seems that the 'Sicard' dumpers are not normally used to transport goods and materials on roads and that they are mainly utilized off the roads, on rough terrains, to carry heavy materials from one place to another, namely, from the loading point to the dumping site, nevertheless the fact remains that they basically are a conveyance, since their main and dominant utility and purpose appears to be to transport materials from one place to another.

13. The learned counsel for the respondents relied on the Letter of Intent issued by the Government which was later converted into an Industrial Licence under the

Industries (Development and Regulation) Act, 1951. According to him, the licence was granted for the manufacture of earth moving machinery described in Item 11 of Schedule I to that Act. In contrast, he said, the motor vehicles fall under Item 7 of the Schedule I of the said Act. It was urged that the 'Off-the-Highway Dumpers' manufactured by the respondents were therefore different from the transportation items including motor vehicles. The learned counsel for the respondents also drew our attention to the agreement dated 27-10-62 entered into between the President of India and the Foreign collaborators where it is mentioned that the licence was for the manufacture and supply of heavy construction and mining equipment. In our view these factors will not have any bearing to determine the tariff classification. The purpose of Industrial licence granted to the industries under that Act is totally different and distinct and is not relevant for examination of a tariff entry under the Central Excises and Salt Act, 1944. Even assuming that these were treated as earthmoving machinery for the purpose of the industrial licence that will not be a ground for consideration of the classification under the Central Excises and Salt Act.

14. We must also refer to the judgement of the Bombay High Court in Appeal No. 74/76 (V.M. Salgocar and Brothers Pvt. Ltd. & Co. v. S.B.Patil and Ors.) where the question arose whether the dumpers were not conveyance falling under Item 75 of the Customs Act but were mining machinery falling under Item 72(18) or earthmoving machinery falling under Item 72(1). At paragraph 26 we find the following observations :- "Considered from that point of view, the said 'Dumpers' which are basically conveyances though specifically built for carrying heavy iron ore in a rough terrain cannot be considered to be any part of the mining machinery for being classified under Item 72(18). In our view the fact that the said 'Dumpers' are specifically built and equipped with mechanical process of loading and unloading or that under the licence the petitioners are required to use them only in their respective mining area would not make any difference to the nature of the 'dumpers' which would nonetheless basically remain 'conveyances' and would not be considered as 'Mining Machinery' as contended by the learned counsel for the petitioners." Though the decision was rendered in respect of classification under the Customs Act, the above observations assist us in determining the nature and character of the product.

15. The learned counsel urged that concessional rates of customs duty was applicable on import of components for manufacture of dumpers by the respondents and placed relevant notification in regard to it. But the criteria for grant of exemption under the Customs Act, 1962 appears to be on the basis of net weights and which is designed for use off the Highway. The same will not be relevant to the present controversy. The learned counsel also placed before us several orders by the authorities where it was held that the respondents were not liable to pay Cess imposed under the Industries (Development and Regulation) Act, 1951. He relied on the Memorandum issued by the Ministry of Industry dated 1-6-84 where it was confirmed that tractors, trailers and earthmoving equipment are not covered for levy of Cess. We are of the view that the levy of Cess on such types of vehicles are governed by different provisions and considerations and they have no relevancy to determine the present issue. Unless a Tariff Entry itself provides the basis for such a consideration reference to other enactments will have no bearing.

16. The respondents urged that these equipments are excisable to Sales Tax not as motor vehicles. They also referred to Entry 20 of the Second Schedule to the Karnataka Sales Tax Act 1957 which refers to all Machinery and spare parts and accessories thereof in contrast to Entry No. 70 which refers to motor vehicles including motor cars, motor taxi cabs, motor cycle, etc. We must say that the classification for the purpose of Sales Tax is governed under the respective enactments of the States. Those Acts contain the in-built definitions regarding the definitions applicable for Sales Tax assessment. Those definitions cannot be looked into for determining the assessability under the Central Excises and Salt Act.

17. The learned counsel for the respondents vehemently argued that the dumpers purchased from the Government were used in project areas and mines inside to which public have ordinarily no access and they could not be considered as public roads. As already pointed out the ultimate or end use of these dumpers in Project or Mining areas will not conclude the issue. If these vehicles are adapted for use in all public roads then they should be classified under Tariff Item 34. Facts already pointed out prove that these dumpers have been designed for use on public roads

at least as a measure in transit, and were actually sent by road for purposes of delivery.

18. Arguments were advanced that these dumpers were not designed or adapted for use on roads and in fact could not ply on public roads. It is stated that the dumpers are not used as a mode of transport or conveyance and the dumper is measured in terms of hours of use and not in terms of mileage covered as in the case of motor vehicles. Even this argument does not stand scrutiny because the dumpers have been actually designed and adapted for use on roads so that they could reach the destination from the manufacturing centre. It may be that they are not used on public roads as a normal mode of transport for passengers or conveyance of goods as in the case of other motor vehicles. But the entry should be strictly construed and it does not envisage any such use if the benefit of exclusion is to be claimed. As directed by the Karnataka High Court, if these types of vehicles are adapted for use on public roads they would come within the ambit of Tariff Item 34. The learned counsel for the respondents also urged that these dumpers conform to the descriptions/ specifications of "off Highway Dumpers" (vide Handbook on Heavy Construction by Havers and Stubbs). He urged that the dumpers are more than 15 tonnes capacity and hence they are "off the highway dumpers" and therefore are not adapted for use on public roads. The consumption of fuel, and the price of these vehicles vary when compared to the other commercial motor vehicles. The tyre cost of Dumper varies from Rs. 76045 to Rs. 33702. The tyre life is 3000 hours on an average while the cost of a truck tyre is Rs. 3078.

These features were pointed out in support of the contentions of the respondents. But in our view these factors by themselves will not conclude the issue. If these vehicles are adapted for use upon public roads, that would determine the classification.

19. The learned counsel also urged that the dumpers are not adapted for use upon roads and that special permissions are required to pass over public roads. He drew our attention to the provisions in several Motor Vehicles Enactments which restrict the maximum permissible size and weight of the vehicle. He stated that

these dumpers have been permitted by the authorities to pass over public roads. Such permissions are granted subject to stringent conditions such as running empty, strengthening of bridges, moving on stipulated routes, during particular time of the day, etc. In our view such regulations on the use of these vehicles on public roads would not exclude it from the ambit of the Tariff Item 34. The object of the Motor Vehicles Enactments is to maintain the public roads in a proper condition and also secure the safety of the people moving on the public roads. These restrictions are imposed by the State Governments regarding size, capacity, safety, hours of use, etc. They are regulatory measures in the interest of public safety. The bridges are intended not only for movement of this type of vehicles but also for use by other modes of transport like buses, lorries and even bullock carts, etc. Some of these vehicles are very sturdy, heavy and are at times of considerable size. Under those circumstances it is the duty of the authorities to protect the interests of the safety and convenience of the public and at the same time to keep a close control and to regulate transport of public service. These restrictions or regulations will not show that the vehicles are not adapted for use on public roads. On the contrary, they prove that these vehicles are adapted for use on public roads subject to certain restrictions imposed by the State Governments. We do not see much force in the contentions raised.

20. The learned counsel urged that water sprinklers which are similar to 35 Ton Dumpers have been classified under T.I. 68 as an equipment and not as motor vehicles. Without copy of relevant order or further facts we are not able to reach a different conclusion with respect to that classification.

21. The classification by the DGTD as specialised vehicles for earthmoving cannot be the standard for determining the adaptability.

The standards prescribed by the Indian Road Congress has been considered in the case of M/s. Hindustan Motors Ltd. (cited supra) and it was held that the definition of the "motor vehicle" as given in Item 34 would govern the issue and not what has been stated in other enactments or literature.

22. We therefore come to the conclusion that the classification of the dumper should be under T.I. 34 of the Central Excises and Salt Act, 1944.

23. The show cause notice was issued on 6-9-80. The impugned order of the Collector is dated 17-9-79. The learned counsel for the respondents urged that the show cause notice would be barred as under Section 36(2) of the Central Excises and Salt Act, 1944 as it stood then. Shri Lakshmi Kumaran urged that the question of time bar is pending before the Larger Bench and in any event the assessment was not completed as there was a classification dispute. He stated that proviso (3) refers to period under Section 16-A. Even though the Notification giving effect to Section 11-A was issued on 27-11-80, the assent was given to the amending provision of Section 11A on 6-6-78. He stated that it was an incorporation by reference and even though Section 11-A had not come into force on the date of the show cause notice, the period could be computed under Section 11-A. He urged that the second proviso to Section 36(2) would apply and the period will be one year.

24. We have given our careful consideration on the question of limitation. Section 11-A was given effect to on 17-11-80. The proviso should be construed as one of legislation by reference. Even though Section 11-A had not come into force at that time the period set out under Section 11-A could be invoked. The third proviso to Section 11-A refers to a case of levy, non-levy, short levy or erroneous refund. The contention of Shri Lakshmi Kumaran that the assessment was not complete as there was a classification dispute, cannot be approved. The Superintendent had demanded payment of duty on the dumpers manufactured by the respondents and this was the subject matter of the order of dated 25-2-71. The High Court of Karnataka at Bangalore in Writ Petition No. 813 of 1971 considered demand notice issued by the Inspector. The matter was remanded to Deputy Collector for re-adjudication. An order was passed by the Deputy Collector confirming the demand raised by the Inspector in his order dated 7-8-79. The order of the Government also states that it was initially the demand raised by the department. The order of the Deputy Collector was set aside and the impugned order was passed by the Appellate Collector on 17-9-79.

These factors therefore show that as regards the department, the assessment was completed and the party alone raised the dispute about the classification. Under these circumstances, it cannot be said that the assessment was not completed.

The department has issued the demand.

So the third proviso to Section 36 alone would apply to the present facts. If the third proviso applies, the show cause notice should have been issued within a period of six months, in so far as the demand covered by order dated 25-2-71 is concerned. In this case the show cause notice was issued beyond the period of six months. The rulings cited by both sides on the question of limitation merely set out the law and the principles are well settled and beyond dispute.

25. We therefore hold that the show cause notice issued under Section 36(2) dated 6-9-80 is barred by limitation in so far as it relates to the order-in-appeal No. V/34/3/2/69. B.I dated 25-2-71. The appeal in so far as it relates to the classification is approved.

26. In the result, the appeal is partly allowed in respect of the classification under T.I. 34. The appeal as regards the demand relating to the order-in-appeal dated 25-2-71 is held to be barred by limitation. The appeal is disposed of accordingly.

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