

Devidayal Rolling and Refineries Pvt. Ltd. Vs. A.V. Borkar, Superintendent, Central Excise and Others

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Court : Mumbai

Decided On : Jun-17-1982

Reported in : 1983(12)ELT338(Bom)

Judge : S.C. Pratap, J.

Acts : [Central Excise Act, 1944](#) - Sections 4; Central Excise Rules, 1944 - Rules 9, 9(2), 10, 52 and 173G

Appeal No. : Misc. Petition No. 1867 of 1978

Appellant : Devidayal Rolling and Refineries Pvt. Ltd.

Respondent : A.V. Borkar, Superintendent, Central Excise and Others

Advocate for Pet/Ap. : Mr. V. R. Bhandare, Mr. Bhandare

Judgement :

1. The Superintendent of Central Excise, Range IV, Bombay Division, Bombay, issued a demand notice in the sum of Rs. 17,255.36 under rule 9(2) of the Central Excise Rules, 1944, in respect of copper and copper alloy flats, bus bars or copper strips, having thickness between 9.53 mm to 10.00 mm, cleared by the petitioners during the period November 1, 1965 to November 30, 1971. The said demand notice, which was dated April 22, 1972, was subsequently confirmed on December

7, 1972. It was held that copper bus bars and copper strips of dimensions between 0.15 mm and upto 9.52 mm thickness were originally charged to duty as per orders then in force but in view of the revision in the I.S.I. standard coming into effect and applied on and from October 1, 1965, the definition of strips was changed. As per the said changed definition, rolled flat products of 0.16 mm and upto and including 10.00 mm thickness but of any width and generally not cut to length and usually in coil but may be flat or folded, were chargeable to duty. The Excise authorities thus raised the demand on such clearances as the clearances in question were after the revised standard i.e. after October 1, 1965 being for the period from November 1, 1965 to November 30, 1971. The order of the Assistant Collector was, however, challenged by the petitioners in appeal to the Collector of Central Excise. The said appeal was dismissed by the Appellate Collector, Central Excise, Bombay, on October 11, 1974 on the ground that the same was barred by limitation. Revision application was preferred against the said order to the Government of India. By its order dated March 28, 1978 the revisional authority, after notice to the petitioners and after granting a personal hearing and after examining the records of the case, rejected the said revision application holding that the demand was correct. Hence this petition under Article 226 of the Constitution.

2. In support of this petition, I have heard Mr. V. R. Bhandare, learned Counsel for the petitioners. The respondents are represented by their learned Counsel Mr. V. N. Lokur. Considering the rival contentions of the respective Counsel and going through the impugned orders in the light thereof, this is not a case where any different view of the matter can be taken that the one taken by the revisional authority.

3. There does not appear to be any dispute on the basic facts viz., on the quantity cleared, on the period on which the goods were cleared and on the measurement of the goods in question. Main question arising for determination is whether the cleared goods could in law have been cleared without paying duty leviable thereon or whether no duty was leviable thereon. The contention of the petitioners has been that the goods were cleared treating them as 'flats' and, therefore, no duty was leviable thereon. Contention on behalf of the department, however, has been

that the goods were in their correct description 'strips' and the same was excisable under Item 26A(2) of the Central Excise Tariff, and consequently demand was rightly issued for payment of duty thereon under rule 9 of the Central Excise Rules.

4. Mr. Lokur, learned Counsel, invited my attention to the definition of strips in the Indian Standard Glossary of Terms 'copper and copper alloys'. Under Item No. 3.16, strip is defined as follows :-

'Flat product over 0.16 mm and upto and including 10.00 mm thickness of any width and generally not cut to length and usually in coil but may be flat or folded.'

Plain definition and description go to show that the petitioners' product was clearly governed thereunder. In the petition itself attempt has been to give different descriptions of the said product. Reference is also made to British Standard Institute's definition of the said word 'strip'. Now, if the British Standard institute's definition and the Indian Standard Institute's definition of strip happens to be different from one another in certain respects and if the authorities here have followed and applied the definition of the Indian Standard Institution, surely one cannot say that a case for interference therewith is successfully made out by the petitioners in this petition under Article 226 of the Constitution. That apart, I have been referred by the learned Counsel Mr. Lokur to two decisions, one of the Madras High Court and the other of the Delhi High Court, on this aspect. The Madras High Court in M/s. Parry Confectionery Ltd., Madras v. Government of India and others, 1980 ELT 468 observed thus :

'.....In this connection, we may refer to a decision of the Supreme Court reported in Union of India v. Delhi Cloth and General Mills Co. Ltd., : 1973ECR56(SC) , wherein the Supreme Court observed that in technical matter like this, the views expressed by the Indian Standard Institution must be preferred. I see from some of the specifications of the Indian Standard Institution produced that the sectional committee which decides these matters are composed of eminent persons in trade, industry and Government as also consumers and other experts. Their views therefore deserve acceptance by court except where there are other strong considerations to the contrary.'

The Delhi High Court in *Porrits & Spencer (Asia) Limited v. Union of India* and another 1980 ELT 679, has at page 684 observed thus :

'.....In this connection, we may observe that the Supreme Court in the case of *Union of India and another v. Delhi Cloth and General Mills Co. Ltd.*, : 1973ECR56(SC) , has held that the opinion of the Indian Standard Institute is important and had to be preferred to the opinion of an author in that case. We would also prefer to rely upon the opinion of the Indian Standard Institute as expressed in the glossary of textile terms compiled by it in preference to the opinion given by the traders whose affidavits have been filed by the petitioner.'

The position thus, as laid down by the Madras and the Delhi High Courts following the Supreme Court ruling, is that the views expressed by the Indian Standard Institution should be preferred. There is no reason to take any different view on this aspect of the matter. As observed by the Madras High Court, the sectional committee, which decide these matters, are composed of eminent persons in trade, industry and Government as also consumers and other experts. It is thus a comprehensive thinking and adjudication and the end result thereof that emerges as the view and definition laid down by the Indian Standard Institution. One would, therefore, unless an exceptional case otherwise is made out, normally prefer to follow the views and definitions of the Indian Standard Institution rather than the views and the opinion expressed by authors and/or experts or some other standard institutions such as the British Standard Institute. If so, the goods or the articles here are clearly strips and measurement wise the same clearly fall under Tariff Item No. 26A(2) of the Central Excise Tariff.

5. Another contention raised on behalf of the petitioners before the revisional authority was that the demand notice could have been issued only under rule 10 of the Central Excise Rules and not under rule 9 of the Rules. It is not possible to accept this contention. Rule 10 of the Rules applies to a case only when there has been an assessment. Such is not the case here. There has been no assessment as such here at all. The demand was, therefore, rightly made.

6. That apart, Mr. Lokur on behalf of the respondents has invited my attention to rule 10-A of the Central Excise Rules. Considering the said rule, I do not see why

the claim and demand of the respondents should not be said to be recovered and protected by the said rule 10-A. Mr. Bhandare, learned Counsel for the petitioners, referred to a decision of the Supreme Court in *N. B. Sanjana v. The Elphinstone Spinning & Weaving Mills Co. Ltd.*, : 1973ECR6(SC) . I find the said case to be clearly distinguishable from the facts herein. The Supreme Court has referred to rules 9, 10 and 10-A of the Central Excise Rules. It is on the facts of that case that the Supreme Court has come to a conclusion against the department and dismissed its appeal. Even while doing so, the Supreme Court has referred to a Full Bench decision of the Nagpur High Court holding that rule 10-A does cover a case for increased levy on the basis of a change of law and the further fact that the said decision was confirmed by the Supreme Court by dismissing the assessee's appeal therefrom. The said decision of the Supreme Court is *Chhotabhai Jethabhai Patel v. Union of India*, : AIR 1962 SC1006 . In these circumstances, it is not possible to rely upon the aforesaid ruling in favour of the petitioners herein. My attention was also invited to another decision of the Supreme Court in *Assistant Collector of Central Excise, Calcutta v. National Tobacco Co. of India Ltd.*, : 1978(2)ELT416(SC) . In the said ruling the Supreme Court considered its earlier ruling in Sanjana's case (*supra*) and has distinguished the same in certain respects. At page 2573 the Supreme Court observed thus :

'We may point out that rule 10 itself has been amended and made more reasonable in 1969 so as to require a quasi-judicial procedure by serving a show cause notice 'within 3 months from the date on which the duty or charge was paid or adjusted in the owner's account current, if any'. This amendment made on 11-10-1969, indicates that the quasi-judicial procedure, for a finding on an alleged inadvertence, error, collusion, or mis-construction by an officer, or mis-statement by the assessee, as the cause of an alleged short levy resulting from an assessment can now be embarked upon and not necessarily completed within the prescribed period. We are, however, concerned with the procedure before this amendment took place. At that time, it was certainly not clear whether a case would fall under rule 10 even before the short levy or its cause was established. Furthermore, in the present case, the reason for an alleged short-levy could be a change of basis of proposed assessment under instructions from higher authorities mentioned above. Even that change of basis was held by the High Court to be

erroneous. Until the High Court indicated the correct basis there was an uncertainty about it. Such a ground for an alleged short levy would be analogous to the reason for the introduction of rule 10-A itself which, as pointed out in N.R. Sanjana's case, : 1973ECR6(SC) (supra), was a change in the law. One could go back still further and come to the conclusion that the real reason for the alleged short levy was a failure of the Company to supply the fuller information it used to supply previously and not just a mis-statement. If the case does not clearly come within the classes specified in Rule 10, this rule should not be invoked because, as was rightly contended for the appellant, a too wide construction put on rule 10 would make rule 10A useless. The two rules have to be read together.

It is true that rule 10-A seems to deal only with collection and not with the ascertainment of any deficiency in duty or its cause by a quasi-judicial procedure. If, however, it is read in conjunction with section 4 of the Act, we think that a quasi-judicial proceeding, in the circumstances of such a case, could take place under an implied power. It is well established rule of construction that a power to do something essential for the proper and effectual performance of the work which the statute has in contemplation may be implied.'

And still further :

'The question whether there was or was not an implied power to hold an enquiry in the circumstances of the case before us, in view of the provisions of section 4 of the Act read with rule 10A of the Central Excise Rules, was not examined by the Calcutta High Court because it erroneously shut out consideration of the meaning and applicability of rule 10A. The High Court's view was based on an application of the rule of construction that where a mode of performing a duty is laid down by law it must be performed in that mode or not at all. This rule flows from the maxim : 'Expressio unius est exclusio alterius'. But, as was pointed out by Wills J., in *Colquhoun v. Brooks* (1888) 21 CBD 52 , this maxim 'is often a valuable servant, but a dangerous master.....'. The rule is subservient to the basic principle that Courts must endeavour to ascertain the legislative intent and purpose, and then adopt a rule of construction which effectuates rather than one that may defeat these. Moreover, the rule of prohibition by necessary implication could be applied

only where a specified procedure is laid down for the performance of a duty. Although rule 52 makes an assessment obligatory before goods are removed by a manufacturer, yet, neither that rule nor any other rule, as already indicated above, has specified the detailed procedure for an assessment. There is no express prohibition anywhere against an assessment at any other time in the circumstances of a case like the one before us where no 'assessment', as it is understood in law, took place at all. On the other hand, rule 10A indicates that there are residuary powers of making a demand in special circumstances not foreseen by the framers of the Act or the rules. If the assessee disputes the correctness of the demand as assessment becomes necessary to protect the interests of the assessee. A case like the one before us falls more properly within the residuary class of unforeseen cases. We think that, from the provisions of section 4 of the Act read with rule 10A, an implied power to carry out or complete an assessment, not specifically provided for by the rules, can be inferred. No Writs of Prohibition or Mandamus were, therefore, called for in the circumstances of the case.'

7. In my view, considering the aforesaid two rulings of the Supreme Court, the ratio of the ruling in : 1978(2)ELT416(SC) applies to the present case. Consequence is that the claim and demand made on the petitioners would be fully protected by virtue of the provisions of rule 10A of the Central Excise Rules.

8. Mr. Bhandare contended, however, that there was no show cause notice issued to the petitioners and a demand was straightway made. Even this contention, I am afraid, must fail. As long back as on March 7, 1972 the Superintendent of Central Excise did issue a notice to the petitioners informing the petitioners that copper and copper alloy flat products over 0.16 mm and upto and including 10 mm thickness of any width and generally not cut to length supplied in coils and also flat or folded are strips and dutiable under Central Excise Tariff Item No. 26A, sub-item (2). The said notice further goes on to state that all the clearances of the above description in copper and copper alloys should be made by the petitioners on payment of proper duties of excise, basic and regulatory and under G.P. as prescribed under rule 173G of the Central Excise Rules, 1944. The said notice further goes on to state that the particulars of clearances from 1st April, 1965 to

date should be supplied immediately. Though the notice does not in so many terms describe it as a show cause notice, contents of the said notice is eloquent enough to indicate nothing but that. Simple and plain reading thereof should make a recipient such as the petitioners herein, a private limited company, aware and conscious of the aforesaid position. In the circumstances, to permit such a technical argument in a writ petition under Article 226 of the Constitution would be permitting an otherwise just demand to be defeated on a technicality.

9. In the result, I see no good reason to interfere with the impugned orders. This petition, therefore, fails and is dismissed. Rule stands discharged with costs.

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