

Durga Works Vs. Assistant Collector of Central Excise

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Court : Karnataka

Decided On : Feb-07-1991

Reported in : 1991LC39(Karnataka); 1992(61)ELT375(Kar); 1991(2)KarLJ151

Judge : S.R. Rajasekhara Murthy, J.

Acts : [Central Excise Tariff Act, 1985](#)

Appeal No. : Writ Petition No. 14703/1988

Appellant : Durga Works

Respondent : Assistant Collector of Central Excise

Advocate for Def. : Shri Ashok Haranahally, C.G.S.C.

Advocate for Pet/Ap. : Shri G. Chanderkumar, Adv.

Judgement :

ORDER

Rajasekhara Murthy, J.

1. The petitioner is a manufacturer of aluminium filter housing castings out of aluminium alloy ingots supplied to them by M/s. Motor Industries Company Ltd., Hosur Road, Bangalore.

2. On 28-11-1986 the petitioner filed a classification list classifying aluminium filter housing castings under tariff sub-heading 7611.00 of the [Central Excise Tariff Act, 1985](#) (the Act). By virtue of the Notification No. 182/84 - C.E., dated 1-8-1984, as amended by the Notification No. 79/86 C.E., dated 10-2-1986 the excise duty on the said item was exempt.

3. In regard to the classification list filed on 28-11-1986 (Annexure - A), respondent - 1 issued a show cause notice on 7-5-1987, as per Annexure - C proposing to classify the goods under tariff sub-heading 8421.00 and also to levy the appropriate duty thereon

4. The show cause notice culminated in an order of adjudication dated 14-12-1987 made by the respondent, as per Annexure - D, and the show cause notice was confirmed. Against this order, the petitioner went up in appeal before the Collector of Central Excise (Appeals), Madras, who, by his order dated 30-6-1988 (Annexure - E), dismissed the appeal and confirmed the classification under [sub-heading] 8421. Against the said order of the Appellate Collector, the petitioner has filed an appeal before the CEGAT and the appeal is pending.

5. When the matter stood at this stage, a notice of demand dated 17-8-1988 (Annexure - F) was issued by the Superintendent of Central Excise (Annexure - F) calling upon the petitioner to pay differential duty of Rs. 96,665.04 for the period November 1986 to February 1987. This demand was made pursuant to the dismissal of the appeal of the petitioner by the Collector of Appeals. This demand is challenged in this write petition.

6. The main ground urged on behalf of the petitioner by Sri Chanderkumar is : that the demand made by Respondent - 2 is unsustainable in law since the demand is not preceded by issue of a notice as contemplated under Section 11A of the Central Excise Act. He has relied upon two decisions of the Supreme Court in support of this contention :-

(i) Union of India v. Madhumilan - 1988 (35) E.L.T. 349 and,

(ii) Gokak Patel Volkart Ltd. v. Collector of Central Excise, Belgaum : 1987(28)ELT53(SC)

7. Elaborating this contention, it was argued by the learned Counsel that any demand made in respect of a short-levy or short-payment is required to be made in accordance with and in conformity with the requirement of the said section. In the present case, by issue of Annexure - F dated 17-8-1988, it is argued, that straightaway a demand is made by the second respondent to pay the differential duty. This demand, according to the learned Counsel does not satisfy the requirement of Section 11A, as enunciated by the Supreme Court in the two decisions referred to supra.

8. Since this is the main issue that arises for consideration, the other contentions raised in the writ petition are unnecessary to be considered.

9. The first show cause notice issued in this case was on 7-5-1987 (Annexure - C) by which the Department proposed to modify the classification list which had been duly approved. It is pointed out that, apart from the proposal to modify the classification list in the said notice, the differential duty which arose as a result of the proposed modification was not indicated nor demanded in the notice Annexure - C. The matter relating to classification list is pending before the Appellate Tribunal. Therefore, so far as the challenge made in the impugned demand is concerned, the fate of the first show cause notice would not have any material bearing on the legality of the demand made as per Annexure - F.

10. Therefore, I propose to first refer to the dictum of the Supreme Court in Gokak Patel Volkart Ltd. : 1987(28)ELT53(SC) , referred to supra. In the said case the question that came up for consideration before the Supreme Court was : whether without issue of notice, a demand could be made to pay the differential duty or any other demand. The circumstances in which the assessee in that case approached the High Court were these :

The petitioner in that case had challenged the notice dated 28th May 1982 issued by the Asstt. Collector in which a demand was raised against the petitioner for the period 20th June 1976 to 28th February 1981 on the ground that the petitioner was

liable to pay excise duty on its products as a fabric. The dispute between the petitioner and the Department in that case was : whether it was liable to pay excise duty as a fabric, as demanded by the Department in the show cause notice or as yarn as contended by the assessee. The writ petition was ultimately dismissed by the High Court on 16-2-1981 directing the petitioner to urge all the contentions in reply to the show cause notice, before the Department.

After disposal of the writ petition, a show cause notice was issued on 20th May 1982 to the petitioner by the Asstt. Collector demanding the differential duty, which ended in an adjudication and the matter ultimately reached Supreme Court in an appeal under 35L by the assessee.

The subject-matter of the appeal before the Supreme Court was the validity of the show cause notice dated 20th May 1982 issued by the Assistant Collector raising a demand for the period 20th June 1976 to 28th February 1981. This is the period during which the writ petition was pending before the High Court, which assumes importance in view of the contentions raised by the appellant before the Supreme Court about its validity with regard to limitation. The contention as already stated was that the demand was not preceded by service of a notice in terms of Section 11A.

It was found on facts that during the pendency of the writ petition before the High Court, the Department had not issued any notice making a demand for the relevant period, and it was also observed that the High Court had not given any interim direction in the matter of issue of notice or levy of the duty for the period during which the writ petition was pending before the High Court.

Therefore, the question that arose on these facts was, even if the Department succeeded on the question of classification, could they make the demand which was not kept alive from the point of limitation and other requirements of Section 11A

The method or the manner in which the demand could be enforced without bar of limitation was discussed by the Supreme Court in that case and it was observed that the only way in which the Department could salvage the Revenue was by

issue of notice from time to time. It was observed and stated by the Supreme Court in the case of Gokak Patel Volkart Ltd. : 1987(28)ELT53(SC) thus :

'6. No notice seems to have been issued in this case in regard to the period in question. Instead thereof an outright demand had been served. The provisions of Section 11A(1) and (2) make it clear that the statutory scheme is that in the situations covered by sub-section (1) a notice of show cause has to be issued and sub-section (2) requires that the cause shown by way of representation has to be considered by the prescribed authority and then only the amount has to be determined. The scheme is in consonance with the rules of natural justice. An opportunity to be heard is intended to be afforded to the person who is likely to be prejudiced when the order is made before making the order thereof. Notice is thus a condition precedent to a demand under sub-section (2). In the instant case, compliance with this statutory requirements has not been made and, therefore, the demand is in contravention of the statutory provision.'

11. The substances of the ratio of the Supreme Court as could be seen from the above paragraph 6, is that any demand for payment of the differential duty under Section 11A should be preceded by a notice, which is a condition precedent to a demand under sub-section (2). The Supreme Court reached this conclusion analyzing the provision of Section 11A.

12. Dealing with the scheme of the provisions of Section 11A, the Supreme Court observed that for purposes of levy of central excise duty, whether it be for a period of six months or beyond the period of six months under the proviso, a notice on the person charged with duty, is mandatory. It was further observed that the said notice, which is required to be issued under Section 11A(1) should specify the amount payable by the assessee, whether it is short-levy or short-payment. The notice contemplated under sub-section (1) is to be followed by an order of adjudication as required to be done under sub-section (2). In the adjudication, that is to follow, the amount of duty of excise due from the assessee is to be determined and the duty determined cannot exceed the amount specified in the show cause notice issued under sub-section (1). It is in the context of the scheme of Section 11A, as explained by the Supreme Court in Gokak Patel's case, the

demand made by the department failed and the demand notice was quashed being contrary to the statutory provision.

13. In Madhumilan's case 1988 (35) E.L.T. 349, it was, more or less, the same situation on facts. It was also a case of a direct demand made against the assessee on the ground that there was short-payment of excise duty. The notice dated 7-2-1984 was challenged in the writ petition before the Madhya Pradesh High Court. During the pendency of the writ petition another show cause notice was issued on 10th February 1984 proposing to modify the approval of the classification list and calling upon the petitioner to pay the differential duty under Section 11A. This notice was also challenged before the High Court by an amendment made to the writ petition. The High Court quashed both the notices of demand and the order modifying the approved classification list. Against the judgment of the High Court an appeal was filed by the Union of India before the Supreme Court.

The point that arose for decision before the Supreme Court was : whether the demand made on 7-2-1984 to pay the differential duty of Rs. 26,47,749.39 against the petitioner was a valid demand After discussing the provisions of the statute in detail, their Lordships held that before any demand is made on any person chargeable to duty under the Act, a notice requiring him to show cause why he should not pay the amount specified in the notice must be served on him. The Supreme Court also referred to their earlier decision in Gokak Patel case : 1987(28)ELT53(SC) and reiterated that under the statutory scheme of Section 11A and held as follows :

'(1) a notice of show cause has to be issued and sub-section (2) requires that the cause shown by way of representation has to be considered by the prescribed authority and then only the amounts has to be determined. The scheme is in consonance with the rules of natural justice. An opportunity to be heard is intended to be afforded to the person who is likely to be prejudiced when the order is made before making the order. Notice is thus a condition precedent to a demand under sub-section (2).'

Dealing with the notice dated 10-2-1984, it was held that the said notice cannot be regarded as a show cause notice against the modification of the classification list in respect of the period in question, since the demand was made on a ex-post-facto decision taken by the Asstt. Collector modifying the approved classification without issue of a notice. So far as the first show cause notice was concerned it was struck down on the sole ground that it was not preceded by a notice before modifying the classification list. On the basis of the ratio of these two decisions, it was argued that the impugned demand in the present case also should fall to the ground.

14. Let me now refer to the factual position in the present case. The demand notice, as per Annexure - F, is a demand made to pay the differential duty for the period November 1986 to February 1987 in a sum of Rs. 96,665.04. It is not the case of the Department that this demand, was preceded by any notice demanding the differential duty on the basis of the modified classification list. The procedure which the Department should have adopted before making the demand was, either no mention in the show cause notice dated 7-5-1987 the differential duty or the demand made as per Annexure - F should have been preceded by a show cause notice proposing to modifying the approved classification.

15. The question as to the modification of the classification list is pending before the Tribunal. Whatever may be result of the appeal regarding the classification, the question that the Department has to answer is, whether they could make the demand of short-levy without issue of show cause notice

16. An attempt was made by Sri Ashok Haranahally, the learned Standing Counsel for the Department that the two notices should be linked together and read together in continuation. The argument of the learned Standing Counsel is that as a result of the order passed by Assistant Collector of Central Excise modifying the classification, what remained to be done by the Department was to make a demand as per Annexure - F indicating the amount that become due as a result of the Assistant Collector's order.

17. I am unable to agree with the said contention. Sri Ashok also relied upon the decision of the Delhi High Court reported in 1981 (8) E.L.T. 642 Hindustan

Aluminium Corporation v. Supdt. of Central Excise, and the observations made in Paragraph 19 of the said Judgment is sought to be relied upon.

18. The High Court of Delhi considered the arguments of the Counsel for the assessee that the show cause notice which did not specify the amount of duty, which the assessee was required to pay, should be held as unlawful in law. Rejecting this contention, the Court held that it was the requirement of Rule 10 (before it was substituted by Section 11A) to specify the amount in the show cause notice itself and non-mentioning of the amount in the show cause will not render it void.

19. One other decision rendered by the Bombay High Court even before the Supreme Court laid down in the year 1987 when Gokak Patel's case was decided, and in 1988 when Madhumilan Syntax Pvt. Ltd. case was decided was cited by Sri Chander Kumar. A Division Bench of the Bombay High Court in Simmonds Marshall v. M.R. Baralikar, Asstt. Collector of Central Excise, Pune - 1985 (22) E.L.T. 378, had taken the view that a direct demand without issue of show cause notice would not be in conformity with the requirement of Section 11A.

20. After due consideration of the arguments of the learned Counsel and applying the law as enunciated by the Supreme Court, what emerges from the scheme of Section 11A is :

- (i) under the scheme of 11A, the primary object is to recover central excise duty, which is short-paid or short levied;
- (ii) any proceedings which the Department initiates under the said provision must be started by issue of a show cause notice calling upon the assessee to show cause as to why the differential duty as mentioned in the notice should not be paid;
- (iii) the Assistant Collector is required to adjudicate after hearing the person concerned and determine the amount of duty of excise due from such person, and
- (iv) thereupon issue a notice of demand.

21. The power conferred under Section 11A is again hedged by several conditions, viz., the time-limit within which the notice can be issued. If the short levy or short payment is sought to be recovered by the Department, a show cause notice has to be issued within six months from the relevant date and in cases where the escapement or short-levy has occurred on account of suppression or wilful misstatement on the part of the assessee, five years time-limit is provided.

22. Therefore, any proceedings under Section 11A involves three stages :

- (i) issue of a show cause notice,
- (ii) adjudication by competent authority, and
- (iii) issue of a demand to recover the duty.

23. The other important requirement of the provision is that the notice itself must specify the amount liable to be paid by the assessee and the adjudicating authority has to determine the actual amount of central excise duty that may become payable after considering the representation made by the person concerned.

24. The other ground urged in the writ petition is about the competency of Respondent - 2, Superintendent of Central Excise to issue the demand for a period beyond six months is a tenable objection taken as to his jurisdiction. This contention is also upheld.

25. For the reasons stated above, the demand, as per Annexure - F, is liable to be set aside. The writ petition is accordingly allowed and the demand notice dated 17-8-1988 (Annexure - 'F'), is set aside.