

Techno Pack Ltd. Vs. Assistant Collector of Central Excise

Techno Pack Ltd. Vs. Assistant Collector of Central Excise

SooperKanoon Citation : sooperkanoon.com/429607

Court : Andhra Pradesh

Decided On : Feb-26-1991

Reported in : 1991(1)ALT542; 1991(33)ECC130; 1991(55)ELT158(AP)

Judge : Eswara Prasad and ;Jagannadha Rao, JJ.

Acts : [Central Excise Act, 1944](#) - Sections 3, 11, 11A, 11B and 11C

Appeal No. : Writ Petition No. 9382 of 1990

Appellant : Techno Pack Ltd.

Respondent : Assistant Collector of Central Excise

Advocate for Def. : I. Koti Reddy, Standing Counsel for Central Govt.

Advocate for Pet/Ap. : J. Chalameshwar, Adv.

Judgement :

M. Jagannadha Rao, J.

1. The petitioners are (i) M/s. Techno Pack Ltd., and (ii) J. Krishna Murthy. The 2nd petitioner is a share-holder and Director of the 1st petitioner. The relief claimed in the Writ petition is for the issue of a Writ of Prohibition directing the respondents to refrain from enforcing the Demand Notice No. V/15A/30/656/83. T. 2, dated 29-5-1989 issued by the Central Excise Department, represented by

respondents 1 and 2.

2. The brief facts of the case are as follows :

The 1st petitioner-Company was engaged in the manufacture of Polyethylene Coated Gunny Bags in its factory at Visakhapatnam. It used to purchase duty-paid LDPE granules for manufacture of LDPE lay-flat Tubings and Films, which in turn were captively used in the manufacture of the above mentioned gunny bags. The LDPE lay-flat tubings and films were classified under Entry 15A (2) of the First Schedule to the Central Excises and Salt Act, 1944 (hereinafter called 'the Act'). However, this intermediary product was considered both by the assessee as well as by the Department for a long time, to be not exigible to Central Excise duty. Therefore, duty was neither demanded nor paid by the 1st petitioner for the relevant period, i.e., 23-10-1977 to 22-10-1982. However, in June 1983 the respondents drew certain samples of the LDPE lay-flat tubings and films, and sent them to the Government Test House at Alipore, Calcutta, for ascertaining the thickness of the goods. A report was received from the said Test House on 25-3-1983 by the department, and thereafter a copy of the same was sent to the 1st petitioner. Sometime thereafter the Superintendent of Central Excise, Visakhapatnam, issued a show-cause notice dated 17-11-1983, in exercise of his powers under Section 11A of the Act, calling upon the 1st petitioner to show cause why an amount of Rs. 33,87,138.13 should not be collected from the 1st petitioner towards the basic excise duty, and 5% of special excise duty on the basic excise duty, for the period 23-10-1977 to 22-10-1982. The 1st petitioner sent a reply to the said show-cause notice in writing, and thereafter a personal hearing was given to the 1st petitioner on 9-4-1984. The Assistant Collector of Central Excise then passed an order dated 12-11-1984 holding the 1st petitioner liable to excise duty in the sum mentioned in the show-cause notice. The said order was received by the 1st petitioner on 24-12-1984.

3. In the meanwhile, the Government of India issued a Notification, bearing No. 208/84, Central Excise, dated 16-10-1984, in exercise of powers conferred upon it under Section 11C of the Act. Under that notification, the Central Excise authorities are directed not to demand payment of duty in respect of the above-

mentioned goods for the period 25-11-1978 to 22-10-1982. We shall refer to the details of this notification a little later.

4. After coming to know about the said notification, the 1st petitioner sent a letter dated 4-1-1985 to the Asstt. Collector, bringing to his notice the contents of the said notification dated 16-10-1984 issued by the Government of India, and requesting him not to enforce the demand dated 12-11-1984. The Asstt. Collector replied on 25-2-1985 that the petitioner should prefer an appeal before the appellate authority, rather than request him not to demand the amount assessed. Thereafter, there was prolonged correspondence between the 1st petitioner and the Department. We do not think it necessary to refer to that part of the correspondence in detail. Suffice it to say that by further proceedings dated 29-5-1989 the Asstt. Collector reiterated the original demand in respect of excise duty. Against the said order, an appeal was preferred before the Collector of Central Excise (Appeals), Madras, and the same was dismissed on 16-11-1989. Against the said order of the Collector, a further appeal was preferred before the Central Excise (Control) Appellate Tribunal, Madras, in January, 1990. The learned Tribunal dismissed the appeal by order dated 25-6-1990, holding that inasmuch as the order of levy of duty dated 12-11-1984 passed by the Asstt. Collector was not appealed against and it has become final, the appellant could not have preferred an appeal against a later order of the Asstt. Collector dated 29-5-1989, reiterating the earlier demand. The Tribunal further held that it is not open to the 1st petitioner to make an independent application at this stage for waiver of the pre-deposit duty of Rs. 33,87,138.13 Ps., which had been levied by the Department. With regard to Section 11C of the Act and the notification issued thereunder, they stated as follows :-

'This is a case where a duty was levied as is evidenced by the order of the Asstt. Collector of Central Excise dated 12-11-1984 in accordance with law and that order also has been allowed to become final by reason of the appellants admittedly not having appealed against the same. In such a situation, a creature of the statute like the Tribunal would not have jurisdiction to sit in judgment over the validity of the said order not appealed against and grant a relief, which is declaratory in nature, as prayed for by the appellants.... Since we have already

found that the appellants would not be entitled prima facie to seek waiver of pre-deposit by virtue of Notification issued under Section 11C and since the appellants have categorically stated that they are not putting forth any other plea, we dismiss the application as well as the appeal....'.

Thereafter, it appears, the Superintendent of Central Excise sent a communication dated 25-1-1990 to the petitioner-company stating that if the amount is not paid within 15 days, coercive steps will be taken. It is at that juncture that the petitioners filed the present writ petition, contending that in view of the Notification dated 16-10-1984 issued under Section 11C of the Act, the recovery of duty is not permissible under law and that, therefore, the authorities have no jurisdiction to recover the same in view of the provisions of Article 265 of the Constitution of India.

5. The writ petition was filed on 3-7-1990. It came up for admission before a Bench comprising the Hon'ble Chief Justice and A. Lakshmana Rao, J. on 5-7-1990. On that date, notice before admission was ordered, and an interim stay was granted as prayed for. Thereafter the matter had been coming up before us on various occasion and ultimately, the respondents filed a counter-affidavit on 18-2-1991. In the counter-affidavit it is contended that the earlier order of the Asstt. Collector dated 12-11-1984 has become final as no appeal was preferred by the petitioners against the said order. With regard to the provisions of Section 11C of the Act and the Notification referred to above, it is stated in paragraphs 10 and 11 of the counter-affidavit as follows :-

'(10).... it is submitted that not only the levy but also the collection of duty is under the authority of law only, i.e. under Section 11 of the Central Excise and Salt Act, 1944 as the petitioner has not obtained any stay orders against recovery proceedings.

(11) It is reported that the notification issued under Section 11C is for waiver of duty of excise which was not levied during the relevant period. In the present case it is clearly laid down in the CEGAT's order that the duty has been levied as evidence by the Asstt. Collector's order dated 12-11-1984. ..'

On the basis of these contentions, it is submitted that the writ petition is liable to be dismissed.

6. Under Section 11 of the Act, the Government can recover, as arrears of land revenue, sums due to it towards duty or any other sums of any kind payable to it under any of the provisions of the Act, or the Rules made thereunder. The Section also mentions the procedure for making the recovery. We are not concerned with the provisions of Section 11A or Section 11B, in the present case. We are, however, concerned with Section 11C. It will be necessary to refer to the provisions of the said Section. It reads :

'11C : Power not to recover duty of excise not levied or short-levied as a result of general practice :

Notwithstanding anything contained in this Act, if the Central Government is satisfied -

(a) that a practice was, or is, generally prevalent regarding levy of duty of excise (including non-levy thereof) on any excisable goods; and

(b) that such goods were, or are, liable -

(i) to duty of excise, in cases where according to the said practice the duty was not, or is not being, levied, or

(ii) to a higher amount of duty of excise than what was, or is being levied, according to the said practice,

then, the Central Government may, by notification in the Official Gazette, direct that the whole of the duty of excise payable on such goods, or as the case may be, the duty of excise in excess of that payable on such goods, but for the said practice, shall not be required to be paid in respect of the goods on which the duty of excise was not, or is not being, levied, or was, or is being, short levied, in accordance with the said practice'.

It is under this provision that the Central Government had issued the Notification dated 16-10-1984, relied upon by the petitioners. That notification reads as follows

:-

'... In exercise of the powers conferred by Section 11C of the Central Excises and Salt Act, 1944 (1 of 1944), the Central Government, being satisfied that according to a practice that was generally prevalent regarding levy of duty of excise (including non-levy thereof) under the said Act, the duty of excise on Polyethylene Films, all sorts, of thickness not exceeding 0.25 mm, falling under Item No. 15A of the First Schedule to the said Act, was not being levied under Section 3 of the said Act during the period commencing on the 25th November, 1978 and ending with the 22nd October, 1982, hereby directs that the whole of the duty of excise leviable under the said Act, and the special duties of excise leviable under -

- (a) Sub-Section (1) of Section 37 of the Finance Act, 1978 (19 of 1978);
- (b) Sub-Section (1) of Section 32 of the Finance Act, 1979 (21 of 1979);
- (c) Sub-Section (1) of Section 5 of the Finance Act, 1980 (13 of 1980);
- (d) Sub-Section (1) of Section 49 (1) of the Finance Act, 1981 (16 of 1981); and
- (e) Sub-Section (1) of Section 50 of the Finance Act, 1982 (14 of 1982).

on such polyethylene films shall not be required to be paid in respect of such polyethylene films, on which the duty of excise and the special duties of excise were not levied during the period aforesaid in accordance with the said practice...'

7. From a reading of Section 11C, extracted above, it appears to us that the said provision was intended to stop recovery of excise duty which was not levied, is short-levied, as a result of a general practice. The Section starts with a non obstante clause, viz., 'notwithstanding anything contained in this Act'. It then refers in sub-clause (a) to 'trade practice', and says, if the Central Government is satisfied that a practice was, or is generally prevalent regarding levy of duty of excise (including non-levy thereof) on any excisable goods, and further that, such goods were, or are, liable (i) to duty of excise, in cases where according to the said practice the duty was not, or is not being levied, or (ii) to a higher amount of duty of excise than what was, or is being levied, according to the said practice,

then the Central Government may, by notification, direct that the whole of the duty of excise payable on such goods, or as the case may be, the duty of excise in excess of that payable in respect of such goods, but for the said practice, shall not be required to be 'paid' in respect of the goods on which the duty of excise was not, or is not being, levied, or was, or is being, short-levied, in accordance with the said practice.

8. In our view the question of 'recovery' of duty of excise, which Section 11C intends to stop, would arise only if a levy has been made by the authorities contrary to the generally prevalent practice regarding levy of duty, including non-levy thereof, on any excisable goods. In other word, whenever there was, or is, such a generally prevalent practice, and for some reason or other it has been deviated from by the authorities and a levy is made under the Act, the Central Government may, by notification, stop recovery of duty under such levy, if it is satisfied that there was a general practice as mentioned in the said Section. It is pursuant to the exercise of these powers under Section 11C of the Act that the Government of India had issued Notification dated 16-10-1984, covering the period 25-11-1978 to 22-10-1982 in respect of the goods in question. In view of the said notification it is, therefore, clear that notwithstanding the levy, or the orders of the assessment, recovery of duty in respect of the said period is liable to be stopped.

9. The fact that the order of assessment dated 12-11-1984 passed by the Asstt. Collector had become final is, in our view, not an answer to the applicability of Section 11C, and the Notification dated 16-10-1984. That the goods in question are liable to duty but for the general trade practice, is not in dispute between the parties. The existence of the general practice of non-levy of duty in respect of these goods, is a fact recognized by the Government of India under the Notification dated 16-10-1984. It is in such cases that the Government steps into the scene and directs that the duty levied shall not be required to be 'paid'. In fact, the petitioners cannot file an appeal against the order of assessment, but can only seeks relief against the collection of duty under Section 11C, in view of the Notification dated 16-10-1984. We are, therefore, of the view that the petitioners are entitled to approach this Court for stay of collection of duty under the

impugned Demand Notice, notwithstanding the fact that they have not preferred any appeal against the order dated 12-11-1984 making the assessment.

10. It is, however, argued by the learned Standing Counsel for the Central Government, on the basis of paragraph 11 of the counter-affidavit, that Section 11C is not attracted to cases where a levy has already been made by the assessing authority against a person, and that the said Section is applicable only to particular cases where a levy has not been made. For this purpose reliance is placed on the concluding words of Section 11C which read as follow :-

'.... on which the duty of excise was not, or is not being, levied, or was, or is being, short-levied, in accordance with the said practice'.

In our view, this submission is not correct, and is based upon a mis-reading of the abovesaid provision. The Section says that, if under a general practice in the trade, particular goods are not being assessed to duty, but have been assessed to duty, only then the Section comes into play. The words in the latter part of the Section, extracted above-referring to duty of excise not levied, or not being levied - are referable to the concluding words 'in accordance with the said practice'. In other words, if duty was not levied, or was not being levied, in accordance with the said practice, then the Section comes into operation. The said words 'duty of excise was not, or is not being, levied' do not describe the actual action of the assessing authority in the particular case, but refer to the general practice under which duty was not, or is not being levied. It is, therefore, clear that, if duty was being levied under a general practice prevalent and the Central Government recognized the existence of such a practice, it can stop the recovery of duty by issuing a Notification under Section 11C, notwithstanding anything contained in the Act, i.e., notwithstanding the existence of an order levying duty, already passed by the authorities. We, therefore, reject the abovesaid contention raised by the learned Standing Counsel for the Central Government.

11. It is, however, to be noted that the period covered by the aforesaid notification is 25-11-1978 to 22-10-1982, whereas the period covered by the demand in question is 23-10-1977 to 22-10-1982. It is clear that the notification does not cover the period from 23-10-1977 to 24-11-1978. We, accordingly, clarify that it is

open to the respondents to issue a revised demand to the petitioners in respect of duty payable for the goods in question, for the period from 23-10-1977 to 24-11-1978. So far as the excise duty for the period from 25-11-1978 to 22-10-1982 is concerned, we hereby direct the respondents not to enforce the demand for the duty leviable, and levied, for that period.

12. The Writ Petition is allowed to the extent indicated above. There shall be no order as to costs.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com