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Court : Allahabad

Decided On : Feb-13-1991

Reported in : 1992(91)LC28(Allahabad)

Judge : B.P. Jeevan Reddy, C.J. and ;R.A. Sharma, J.

Appeal No. : Civil Misc. Writ Petition No. 1569 of 1989

Appellant : Ester Industries Ltd.

Respondent : Supdt. of Central Excise and ors.

Judgement :

B.P. Jeevan Reddy, C.J.

1. This is a petition for issuance of a writ of mandamus restraining the respondents (Officers of the Central Excise Department) from demanding or recovering a sum of Rs. 22,52,188.11 on account of duty in respect of goods cleared on 30.10.1989.

2. The petitioner is a public limited company engaged in manufacture of polyester filament yarn, both textured and non-textured, in its factory located at Khatima, district Nainital. In commenced production in March, 1988, Polyester filament yarn manufactured by the petitioner falls under tariff item 5402.20 (other than textured) and 5403.20 (textured). The rates of duty are specified in Notification No. 53 of 1987 dated 1st March, 1987 as amended from time to time. The petitioners say that its factory is located in a 'A' class backward area and that it has been making

representations to the Government of India, Ministry of Finance for grant of fiscal concessions particularly in the matter of excise duty. On the basis of said representations, says the petitioner, the Government of India, Ministry of Finance, Department of Revenue issued Notification No. 186/89-CE dated 24ih October, 1989 under Section 5A of the Central Excises and Salt Act, 1944. This notification exempted 'polyester filament staple fibre falling under heading No. 54.02 or 55.01 of the schedule to the Central Excise Tariff Act, 1985, from so much of the duty of excise leviable thereon as is specified in the said schedule in excess of the amount calculated at the rate of 50 per cent of the duty for the time being leviable thereon.' This exemption was, however, available to a manufacturer (i) who has commenced production on or after 1.1.1988 and (ii) if his factory is located in an area declared backward by the Government in a State or an Union Territory, as the case may be. Para 2 of the Notification stated 'this notification shall be in force to and inclusive of the 31st day of October, 1990.' The petitioner says that he was entitled to the benefit of the said notification and that accordingly he was clearing the goods paying duty in accordance with the said notification. While so, it is complained, the said notification was revoked by another notification dated 30th October, 1989 being Notification No. 187/89. This notification is again issued under Section 5A of the Act. It says 'The Central Government, being satisfied that it is necessary in the public interest so to do, hereby rescinds the Notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 186/89-Central Excise, dated the 24th October, 1989.' It was published in the Gazette of the same date.

3. Now the controversy involved in this writ petition arises this way. On 30th October, 1989 the petitioner cleared certain goods paying the concessional duty in accordance with Notification No. 186/89. The department, however, has raised a demand for the full duty payable on the goods cleared on the said date on the ground that the concessional Notification (No. 186/89) was rescinded with effect from 30th October, 1989 and, therefore, the goods cleared by the petitioner on that date are liable to duty at the full rate. The petitioner's case, however, is that the subsequent Notification dated 30th October, 1989 (No. 187/89) though purports to have been published on 30th October, 1989 was indeed not published on that date and that at any rate it was not made available to the public on the said date. The

petitioner has repeatedly stated in the writ petition that the said notification was not published in the official gazette and that it was not made known to those directly concerned with the same on that day or even on the next day. It was made known only some time later. In paragraphs 7 and 8 of the writ petition the petitioner has averred that the said notification was not published in the gazette dated 30th October, 1989 and in any event it was not available to the public or to any one else on or before 1st November, 1989. The petitioner submits, relying upon certain decisions, that in case of subordinate legislation it comes into effect only when it is published and made available to the public. The respondents, however, have denied this allegation in their counter affidavit where it is asserted 'the said notification was made (available) to public and press on the very date of issue of the notification...' In support of this averment the respondents have also relied upon a news item published in a Hindi Daily 'Punjab Kesari' dated 1.11.1989.

4. After hearing the learned Counsel for the petitioner and the learned Standing Counsel for the Central Government, we do not think it appropriate to go into the merits of the controversy raised herein, for the reason that the said issue is now pending decisions before the Assistant Collector of Central Excise. Indeed, for the said amount, the three authorities have simultaneously raised demands. In the first instance a letter dated 23d November 1989 was written by the Inspector, Central Excise, Khatima (second respondent in the writ petition) demanding the said duty from the petitioner. To this, the petitioner replied denying his liability. Thereupon the Superintendent of Central Excise, Khatima (first respondent) issued a letter dated 5th December, 1989 demanding the very same duty and also referring the letter of demand of the Inspector. In response to this letter, the petitioner says, he made a representation to the Superintendent of Central Excise too denying his liability to pay the said duty. It is then that the Assistant Collector, Central Excise, has issued a notice calling upon the petitioner to show cause as to why the petitioner should not be made liable to pay the said duty under the provisions of Rules 9, 9A and 49 of the Central Excise Rules, 1944, and why a penalty should not be imposed upon him under Rule 209(d) of the Central Excise Rules, 1944, vide show cause notice dated 8.2.1990 issued by the Assistant Collector of Central Excise, Rampur. The petitioner says that no orders have been passed either by the Inspector or by the Superintendent of Central Excise on the basis of

the representations made by him in response to their letters. It is also brought to our notice by the learned Counsel for the petitioner that even the Assistant Collector of Central Excise has so far not passed any orders in pursuance of the aforesaid show cause notice. In our opinion, the questions raised herein can best be decided by the Assistant Collector of Central Excise. As stated above, while the petitioner says that the notification dated 30th October, 1989 was not published in the gazette dated 30th October, 1989 and that in any event it was not available to the public on the said day or the next day, the respondents averred to the contrary. According to the respondents it was published on the same date and was made available to the public on the same day i.e. 30th October, 1989. This disputed question can best be gone into by the Assistant Collector of Central Excise. It is open to the petitioner to raise all such contentions that are open to them in law in response to the said show cause notice issued by the Assistant Collector of Central Excise (third respondent). The Assistant Collector of Central Excise shall consider the same and pass final orders according to law.

5. If the petitioner has not so far furnished explanation/objections to the said show cause notice issued by the Assistant Collector of Central Excise, he may do so within three weeks from today. The Assistant Collector of Central Excise shall pass orders in the matter as expeditiously as possible preferably within three months from the date of filing of a certified copy of this order before him by the petitioner. The petitioner shall produce a certified copy of this order before the Assistant Collector of Central Excise within three weeks from today. Pending passing of final orders by the Assistant Collector of Central Excise the interim order granted by this Court in 1.12.1989 in the stay petition filed in this writ petition, shall continue. If, however the petitioner does not produce a certified copy of this order before the Assistant Collector of Central Excise within three weeks from today, this direction shall cease to operate after the expiry of three weeks from today.

6. The writ petition is disposed of with the above directions. No costs.

7. A copy of this order shall be furnished to the learned Counsel for the petitioner on payment of usual charges within ten days.