(2001) 02 MP CK 0058

In the Madhya Pradesh High Court

Case No : M.P. No. 982/93

Alpine Solvex Limited and Another APPELLANT

Vs

Union of India (UOI) and Others RESPONDENT

Date of Decision : 14-02-2001

Acts Referred:

Constitution of India, 1950 — Article 226, 227
General Clauses Act, 1897 — Section 3(25)
Transfer of Property Act, 1882 — Section 3

Citation : (2001) 75 ECC 247 : (2001) 138 ELT 58

Hon'ble Judges : A.M. Sapre, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

A.M. Sapre, J.—By filing this writ under Articles 226 and 227 of the Constitution of India, the petitioner seeks to quash the show cause notice dated 29.1.1993, issued by the Collector Customs and Central Excise (Annexure D). Facts in brief are these.

2.The petitioner is engaged in the business of manufacture of finding (sic) [miexed] vegetable oil and is having their solvent extraction plant.

3. On 29.1.1993, the Collector Customs and Central Excise issued a show cause notice (Annexure D) to the petitioner. The show cause notice is founded on following allegations:

1. M/s. Alpine Solvex Limited, Pithampur (hereinafter referred to as the noticee) having their Registered Office and Solvent Extraction Plant at Mhow Neemuch Road, Pithampur engaged in the manufacture of fixed vegetable oil are found to have carried out fabrication and assembling work of "9" (nine) identifiable items namely (1) seek cleaner, cracker, flaker toaster, extractor, elevators, water treatment plant, and tanks/vessels falling under the Central Excise Tariff Chapter/ Heading No. 8437.00, 8479.00, 8429.00, 8419.00, 8419.00, 8428.00, 8404.00

and 7309.00 respectively during January 1991 to Sept. 91 and utilised the same for raising the capacity of their solvent extruction plant. During January 1991 to Sept. 1991. The process involved in the manufacturing of above-said machinery items consist of cutting of plates; rolling welding, painting and assembling of different items together. These process amount to manufacture and products so manufactured attract Central Excise duty @ 15% advl.

2. It is seen that noticee M/s. Alpine Solvex Limited, had entered into a contract with M/s. Oilax Engineers Private Limited, Bombay, who vide their proposal No. RED/OLX/CVSS/Alpine/90/2961, dated 8.11.1990 agreed to supply erect and commission the 400 TPD Soyabeen Solvent Extraction Plant for the noticee. It is also seen that the contract itself provided for the fabrication of the items at sight.

4. The notice then set out the factual details about various machines. According to assessing officer, the items which are mentioned in a show cause notice amounts to or/ and partake the nature of manufacture and attracts payment of Excise Duty at the rate of 15% advance (sic) [ad valorem]. The petitioner was asked to show cause why an excise duty be not levied on these items as proposed. The petitioner was asked to file reply to enable the assessing officer to determine the issue raised in the show cause. It is this show cause which is impugned by the petitioner in this petition.

5. The respondents have supported the issuance of show cause.

6. Heard Shri S.N. Kohli, learned Counsel for the petitioners and Shri B.G. Neenna, learned Counsel for respondents.

7. Having heard the learned Counsel for the parties and having perused the impugned show cause, I find no merit in this writ. In my considered opinion, no case for quashing of show cause is made out at the threshold.

8. Perusal of show cause indicate that it is based on facts. In other words, whether a case for payment of excise duty on the items mentioned therein is made out or not? need an inquiry and the same can be held only after the petitioner file reply to show cause and satisfy the authorities with reference to documents and material. In other words, the issue raised in the show cause cannot be decided by this Court in its writ jurisdiction but has to be decided only on facts and by the assessing officer.

9. The jurisdiction of this Court in writ under Articles 226 and 227 of the Constitution of India while examining the legality and validity of any show cause notice issued under any Act is very limited. It is only when it is found that impugned show cause is entirely without jurisdiction or that it is barred by limitation on its face value or that issuing authority has no authority under the Act to issue any such notice are some of the grounds on which writ Court can interfere at the initial stage of its issuing. The writ Court cannot embark upon any factual inquiry with a view to find out whether a particular item mentioned in show cause could be excisable or not? because to give a finding on such issue, it

requires factual inquiry and such inquiry can be held only by an authority who has issued a notice.

10. As observed supra, the recital in the impugned show cause notice clearly indicates that its validity and legality cannot be judged only on issue of law and fact. It is necessary for the petitioner to file proper reply and satisfy the assessing authority (issuing authority) on facts that the items specified in the show cause notice do not constitute any manufacturing process and hence are not exigible to payment of excise.

11. Learned Counsel for the petitioner relied on several authorities such as M/s. Indian Cable Company Ltd., Calcutta Vs. Collector of Central Excise, Calcutta and others, ; Quality Steel Tubes (P) Ltd. Vs. Collector of Central Excise, U.P., ; Triveni Engineering and Industries Ltd. and Another Vs. Commissioner of Central Excise and Another, . In my opinion, it is for the assessing authority to examine in the light of these authorities after the entire factual material is brought on record by the petitioner in reply to show cause as to whether the items specified in the show cause can be held to satisfy the test laid down in these cases. The writ Court cannot apply the law laid down in abstract at this stage for want of material and finding given by the adjudicating authority. All these cases where the law was laid down by the Supreme Court, their Lordships had before them the findings of adjudicating authority and that of appellate authority. Indeed, it is so held by the Supreme Court in these very cases. I may usefully refer to observations of Supreme Court in a case reported in Triveni Engineering and Industries Ltd. and Another Vs. Commissioner of Central Excise and Another, . This is what their Lordships observed in Para 14:

14. There can be no doubt that if an article is an immovable property, it cannot be termed as "excisable goods" for purposes of the Act. From a combined reading of the definition of immovable property in Section 3 of the Transfer of Property Act, Section 3(25) of the General Clauses Act, it is evident that in an immovable property there is neither mobility nor marketability as understood in the Excise Law. Whether an article is permanently fastened to anything attached to the earth require determination of both the intentions as well as the factum of fastening to anything attached to the earth. And this has to be ascertained from the facts and circumstances of each case.

12. Accordingly and in view of aforesaid discussion, I dismiss this petition and grant liberty to the petitioner to file reply to show cause notice both on facts as also on law. Let the reply be filed within one month from the date of this order. As soon as the reply is filed the assessing officer will decide the issue raised in the show cause within two months from the date of filing of the reply by the petitioner. Needless to say, that assessing officer will decide the issue keeping in view the reply filed by the petitioner and the law laid down by the Supreme Court in the cases cited by the petitioner referred supra.

No costs. Security amount, if deposited by the petitioner, be refunded as per rules.