
(1985) 03 GUJ CK 0015

In the Gujarat High Court

Case No : Special Civil Application No. 4358 of 1984

Amit Processors Pvt. Ltd.

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 04-03-1985

Acts Referred:

Central Excise Rules, 1944 — Rule 10, 10(1), 10(2), 11
Khadi and other Handloom Industries Development (Additional Excise Duty on Cloth) Act, 1953 — Section 3, 5

Citation : (1985) 6 ECC 211 : (1986) 6 ECR 46 : (1985) 21 ELT 24

Hon'ble Judges : N.H. Bhatt, J; J.P. Desai, J

Bench : Division Bench

Advocate : D.A. Dave, for the Appellant; S.R. Shah, for the Respondent

Judgement

J.P. Desai, J.—Petitioner No. 1 is a Private Limited Company, while petitioner No. 2 is a shareholder of the said Company. The petitioner-company carries on the business of processing of textile fabrics of various varieties and has for that purpose a process house situated at Ahmedabad. Section 3 of the Khadi and other Handloom Industries Development (Additional Excise Duty on Cloth) Act, 1953 (Act No. 12 of 1953) (hereinafter to be referred to as "the Act of 1953") provides for levy of duty on all cloth manufactured on or after the appointed day in India and on all cloth lying in stock on the appointed day in any factory where cloth is manufactured or in any premises appurtenant thereto. Section 5 of the said Act of 1953 empowers the Central Government to exempt a particular variety of cloth from levy of such duty. In exercise of the said powers, the Union of India, respondent No. 1 in this petition issued a notification exempting processed cotton cloth manufactured on hand-loom or on power-loom from the Additional excise duty leviable thereon under the Act of 1953. The said Notification is issued on 18-6-1963 and is at annexure "A" to the petition. The petitioners received 31 pieces of cloth measuring about 2225 metres from one Jayantilal Atmaram for Swastik Cloth Trading Co., through one Chaturbhai Madhabhai of Vijapur for being processed. The said cloth was manufactured on

power-looms less than five in number as alleged. Necessary classification lists were submitted from time to time for the period from 18-6-1977 to 26-5-1978 claiming exemption as per the Government Notification dated 18-6-1963. The classification lists were accepted and no duty was demanded at that time. Then on 1-8-1978, a notice was issued by the Superintendent of Central Excise, Annexure "D" to this petition, calling upon the petitioner to show cause why additional duty as per the Act of 1953 should not be demanded from the petitioners under Rule 10 of the Central Excise Rules, 1944. Reply to the said notice was given by the petitioners on 19-8-1978 showing cause. Thereafter, proceedings were ending and no action was taken till the year 1984. The Assistant Collector of Central Excise, on 29-6-1984 passed an order, Annexure "H" holding that the petitioners were liable to additional excise duty on the said cloth as per the Act of 1953 and confirmed the notice which was issued under Rule 10. It may be mentioned at this stage that by Notification No. 177, dated 12-11-1980 Rule 10 of the Central Excise Rules, 1944 was omitted with effect from 17-11-1980. A similar provision was, of course, made in the Act viz. by Act No. 25 of 1978 and Section 11A was added and that provision was to come into effect from the appointed date and the appointed date as per Notification No. 182 of 1980 issued by the Government of India was 17-11-1980 and that way Section 11A of the Act also came into force with effect from the same date on which Rule 10 was omitted. The petitioners being dissatisfied with the order passed by the Assistant collector on 29-6-1984 have filed this petition challenging the said order of the Assistant Collector on various grounds. The grounds on which the order is challenged are as follows :

(1) Notice dated 1-8-1978 was issued under Rule 10 and no action was taken as per the said notice upto the month of June, 1984. Rule 10 having been omitted with effect from 17-11-1980, no action could be taken as per the said notice because there is no saving clause anywhere in the notification by which Rule 10 was omitted. The order passed on the basis of the notice issued under Rule 10 is bad and hence liable to be struck down.

(2) The classification lists claiming exemption were approved without modification and hence the power under Rule 10 cannot be exercised particularly when powers under Rule 173B(5) were not exercised to modify the classification.

(3) Show cause notice has not been issued within six months from the relevant date i.e. the date of approval of R.T. 12 returns filed by the petitioners or clearance of the goods as required by Rule 10 and hence bad.

(4) Additional duty is exempt vide Notification No. 115, dated 1-3-1975 stating therein that because basic duty is exempted, additional duty also exempted.

2. We first take up the first contention raised by the petitioners. Rule 10 of the Central Excise Rules, 1944 as it then was prior to its omission with effect from 17-11-1980 as per Notification No. 177 of 1980, dated 12-11-1980, Annexure "F" to the petition read as follows :-

(1) Where any duty has not been levied or paid or has been short-levied or erroneously refunded or any duty assessed has not been paid in full, the proper officer may, within six months from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid, or which has been short-levied, or to whom the refund has erroneously been made, or which has not been paid in full, requiring him to show cause why he should not pay the amount specified in the notice.

Provided that -

(a) where any duty has not been levied or paid, has been short-levied or has not been paid in full, by reason of fraud, collusion or any wilful mis-statement or suppression of facts by such person or his agent, or

(b) where any person or his agent, contravenes any of the provisions of these rules with intent to evade payment of duty and has not paid the duty in full, or

(c) where any duty has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts by such person or his agent, the provisions of this sub-section shall, in any of the cases referred to above, have effect as if for the words "six months", the words "five years" were substituted.

Explanation. - Where the service of the notice is stayed by an order of Court the period of such stay shall be excluded in computing the period of six months, or five years, as the case may be.

(2) The Assistant Collector of Central Excise shall, after considering the representation, if any made by the person on whom notice is served under sub-rule (1) determine the amount of duty due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined."

* * * 3. Sub-rule (2) of Rule 10 thus shows that the said sub-rule empowers the Assistant Collector of Central Excise to consider the representation and determine the amount of duty due in such cases. The superintendent of Excise issued a notice under Rule 10(1) on 1-8-1978, but as stated earlier no action was taken as per Rule 10(2) by the Assistant Collector before Rule 10 was omitted. Action as per the said notice was taken by the Assistant Collector as late as in June 1984 as stated earlier. The question is whether after the rule was omitted, the Assistant Collector could have taken action in pursuance of the said notice when no enabling provision has been made saving actions already initiated under Rule 10. It can be said that action was initiated by issuing a notice under Rule 10(1) when the Rule was in force, but it is clear on the face of it that action was not concluded as per Rule 10(2) before the Rule was omitted. The action which was initiated under Rule 10(1) was concluded after the Rule was omitted by the notification, as stated earlier. The Government Notification, Annexure "F", dated 12-11-1980, Clause 2 says that Rules 10, 11 and 173-J of the Central Excise Rules, 1944 shall be omitted. It does not say anything more than this

anywhere in the said notification. We may mention here even at the cost of repetition that there is no saving provision in the notification, Annexure "F" with regard to actions already initiated in pursuance of Rule 10.

4. The learned Standing Counsel Mr. S. R. Shah for the Union Government and other respondents submitted that though there is no saving clause in the notification, Section 11A is brought on the statute with effect from the same date viz. 17-11-1980 and, therefore, the action which was initiated under Rule 10(1) can be continued and concluded even after the omission of Rule 10 because the provisions of Section 11A are substantially the same as those of Rule 10 as it then existed. The learned Standing Counsel also submitted that Section 6 of the General Clauses Act will save the action of the Assistant Collector, in spite of the omission of Rule 10. Prima facie, one would be inclined to accept the submission made by Mr. Shah that Section 6 of the Central Clauses Act will apply in such a situation. It is, however, not possible to accept this submission of Mr. Shah in view of the decision of the Supreme Court in the case of *M/s. Rayala Corporation (P) Ltd. v. The Director of Enforcement* AIR 1970 S.C. 494 cited by Mr. Dave. The Supreme Court was in that case called upon to consider the effect of omission of Rule 132A of the Defence of India Rules, 1962. It appears from the discussion made at para 12 of the report that while omitting Rule 132A, a provision was made that the rule was omitted except as respects things done or omitted to be done under that rule. In that case, prosecution was not at all started before the rule was omitted. It was contended that the saving clause would save the prosecution but the Supreme Court negatived that contention and held that the language contained in Clause 2 of the Defence of India (Amendment) Rules, 1965 can only afford protection to action already taken while the rule was in force, but cannot justify initiation of a new proceeding which will not be a thing done or omitted to be done under the rule but a new act of initiating proceeding after the rule had ceased to exist.

5. In the present case, as stated earlier there is no such saving provision in the notification issued while omitting Rule 10. The discussion made at para 15 of the report shows that Section 6 of the General Clauses Act was pressed into service in support of the submission that the said provision would save the prosecution filed even after the omission of the rule. But the Supreme Court has held that Section 6 only applies to repeals and not to omissions, and applies when the repeal is of a Central Act or Regulation and not of a rule. In the present case, we are concerned with omission of a rule and not of a Central Act or Regulation and, therefore, looking to this decision of the Supreme Court, it is clear that Section 6 of the General Clauses Act cannot be pressed into service. When Section 6 of the General Clauses cannot be pressed into service and when there is no saving clause in the notification by which Rule 10 was omitted, it is clear that no action could have been taken in pursuance of the said notice which was issued under Rule 10 as it then existed. So far as introduction of Section 11A with effect from 17-11-1980 is concerned, prima facie one may be inclined to say that may also come to the rescue of the Department in continuing the action initiated as per

Rule 10(1). But there is a complete answer to this submission of Mr. Shah also in this very judgment of the Supreme Court and the relevant discussion will be found at para 17 of the report. In that case also it appears that simultaneously with the omission of Rule 132A of the Defence of India rules, Section 4(1) of the Act was amended so as to bring the prohibition contained in Rule 132A(2) u/s 4(1) of the Act. It was contended before the Supreme Court that from this simultaneous action taken, it should be presumed that there was no intention of the Legislature that acts which were offences punishable under Rule 132A of the Defence of India Rules, should go unpunished after the omission of that rule. The Supreme Court negated that contention observing that when Section 4(1) of the Act was amended, the Legislature did not make any provision that an offence previously committed under Rule 132A of the Defence of India rules would continue to remain punishable as an offence of contravention of Section 4(1) of the Act, nor was any provision made permitting operation of Rule 132A itself so as to permit institution of prosecutions in respect of such offences. This decision of the Supreme Court is thus a complete answer to the submission made by Mr. Shah that Section 11A of the Act which was introduced simultaneously with effect from 17-11-1980 would save the act of the Assistant Collector.

6. The learned Advocate Mr. D. A. Dave also draw our attention to a very recent decision of the Allahabad High Court reported in *Ajanta Paper Products, Ratanpura v. Collector of Central Excise, Kanpur* 1982 ELT 201 (All.). The same question as regards the effect of omission of Rule 10 and coming into force of Section 11A of the Act came up for consideration before the Allahabad High Court. The decision of the Supreme Court in the case of *M/s. Rayala Corporation (P) Ltd.* (supra) was cited before the Allahabad High Court and the Allahabad High Court has taken the same view, viz. that no action can be taken as per Rule 10 after Rule 10 was omitted. The effect of Section 11A also was consider by the Allahabad High Court in the light of the decision of the Supreme Court which we have discussed a little earlier. In that case also, the notice was issued on 8-8-1980 i.e. prior to the omission of Rule 10 but action was taken after the omission of Rule 10 and that act of the Assistant Collector was struck down by the Allahabad High Court, relying upon the ratio of the decision of the Supreme Court which has been discussed by us earlier.

7. The learned counsel Mr. S. R. Shah draw our attention to a later decision of the Supreme Court reported in *Jayantilal Amrathlal Vs. The Union of India (UOI)*, . It appears from the facts of the said case that a notice was issued under Rule 126(1) of the Gold Control Rules, 1963 initiating proceedings for forfeiture of seized gold and it was held that it must be deemed to continue by virtue of Section 6 of the General Clauses Act on repeal of Gold (Control) Ordinance, 1968 which had protected the action taken under the Gold Control Rules. It appears that there was a saving provision provided by Section 116(2) of the Gold Control Act, 1968 that the earlier actions taken or initiated were to continue. It further also appears that by Gold (Control) Ordinance, the "Rules" were deemed as an act of Parliament and, therefore, it was held that on the repeal of the "Rules"

and the Gold (Control) Ordinance, 1968, the consequences mentioned in Section 6 of the General Clauses Act follow. In view of this, this decision of the Supreme Court cannot be pressed into service.

8. The learned Standing Counsel Mr. S. R. Shah, however, submitted that once the action is initiated under Rule 10(1) of the Rules, the subsequent omission or repeal will not come in the way in carrying the thing to its logical conclusion. Mr. Shah's argument proceeds on a wrong assumption. An action under Rule 10 consists of two parts, one is the initiation of proceedings and second is the conclusion of the proceedings. But before the proceedings came to be concluded, the power to conclude those proceedings disappeared from the scene. Therefore, the argument that once the action is initiated, it can be said to have been taken under Rule 10 does not appeal to us.

9. The result of the aforesaid discussion is that the order passed by the Assistant Collector, vide Annexure "H" should be struck down as it was passed without authority of law. As we are inclined to accept the first ground of the petitioners, we do not propose to go into discussion of the other grounds which have been taken by the petitioners.

10. The petition is allowed. The notice, Annexure "D", dated 1-8-1978 and the order, Annexure "H", dated 29-6-1984 passed by the Assistant Collector are declared to be without any authority of law and, therefore, they are quashed. Rule is accordingly made absolute, with no order as to costs.

11. The learned Standing Counsel Mr. S. R. Shah prays for a certificate for leave to appeal to the Supreme Court. In our opinion, this matter does not involve any question of law of general importance required to be decided by the Supreme Court and, therefore, we are not inclined to grant that request. The request is rejected.