

(1990) 11 KAR CK 0014

In the Karnataka High Court

Case No : Writ Petition No"s. 20617 to 20621 of 1986

Applied Industrial Products Private Ltd.

APPELLANT

Vs

Collector of C. Ex.

RESPONDENT

Date of Decision : 30-11-1990

Acts Referred:

Central Excise Act, 1944 — Section 11 A

Citation : (1991) 32 ECC 104 : (1992) 61 ELT 364

Hon'ble Judges : S.R. Rajasekhara Murthy, J

Bench : Single Bench

Advocate : Shri S. Ganesh and M.R. Naik, for the Appellant; Shri Ashok Haranahally, C.G.S.C., for the Respondent

Judgement

Rajasekhara Murthy, J.—In these writ petitions the petitioners have challenged the show-cause notice issued by the Collector of Central Excise, Bangalore, dated 11-11-1986 (Anx - "O") proposing to levy differential duty on the petitioner on the value of the items of machinery and components got manufactured by the petitioner-company through sub-contractors and job-workers.

2. The first-petitioner is a private limited company, and the second petitioner is its Executive Director. The petitioner-company undertakes works of design, manufacturing, installation, erection and commissioning of cement-plants, coal-handling systems, etc., at the customers" site.

3. Though five writ petitions are filed, the challenge is only to the show-cause notice which is issued for recovery of the differential excise duty on the value of certain components and machinery got manufactured through job-workers between 1-4-1981 and 28-2-1986. There appears to be a clerical mistake in mentioning the date 28-2-1982 in the show-cause notice instead of 28-2-1986. This is made clear in the statement of objections filed on behalf of the respondents.

4. The allegations made against the petitioners in the impugned show-cause

notice are :-

(i) that the petitioners got manufactured excisable goods from small-scale manufacturers, viz., job-workers, out of the raw-materials supplied by them and manufactured under their supervision and control, and, thus suppressed the clearances of such goods, and have evaded payment of excise duty on the value of the articles manufactured and supplied by job-workers during the period 1-4-1981 to 28-2-1986; and

(ii) the value of the total clearances during the period is estimated at Rs. 9,25,96,498/-, and, a differential duty of Rs. 73,42,587.37 ps., is demanded on the goods alleged to have been removed clandestinely with out payment of duty during the said period.

5. In the annexure to the show-cause notice the modus operandi adopted by the petitioners is mentioned. It is stated therein, that the petitioners used to get the excisable goods manufactured through their sub-contractors out of the raw-materials supplied by them and cleared those goods to their customers directly to the work-site without payment of duty. The allegations is that the petitioners adopted this method to avoid payment of duty. The allegation is that the petitioners adopted this method to avoid payment of excise duty and the sub-contractors and job-workers used to claim exemption on their manufacture as small-scale units and this was detected by the officers of the Department during the course of search conducted in the factory premises on 17-5-1985.

6. An abstract showing the details of the clearances made by the petitioners during the period in question - duty paid, duty due, etc., is furnished along with the notice. The value of all the goods covered by invoices issued by the petitioner-company during the period in question is given in Column No. 2 in the abstract, viz., Rs. 8,43,78,399.71. The aggregate of value of such goods including the design charges and freight and insurance is shown in Column No. 5 of the abstract, viz., Rs. 9,25,96,498.12. Column No. 6 gives the central excise duty paid by the petitioner-company on the value of goods manufactured by it and cleared from its factory. The last column gives the difference of duty demanded from the petitioner-company. This sum is arrived at after deducting the excise duty paid by the petitioner-company on its manufacture which is also included in the total value of goods mentioned in Col. No. 1.

7. The difference of duty of Rs. 73,42,587.37 ps. represents the duty payable on the goods got manufactured by the petitioner-company through their sub-contractors out of raw-materials and specifications issued to them and the value of which was alleged to have been suppressed in the classification lists filed by the petitioner-company. This demand made in the show-cause notice (Annexure - "O"), is challenged in the writ petitions.

8. Before adverting to the contentions urged on behalf of the petitioners, it is necessary to refer to certain relevant facts set out by the petitioners in these writ petitions :

(i) that the petitioners undertake works of design, manufacturing, installation, erection and commissioning of cement plants, coal-handling system, etc., at the customers' site;

(ii) for this purpose, the petitioners fabricate some of the parts/equipments in their factory at Bangalore and remove them to the work-site. On the goods manufactured by the petitioner-company, central excise duty is being paid wherever it is due, and, this is not disputed by the Department.

(iii) petitioners also purchase parts/equipments from other dealers and manufactures, viz., bought-out items, which are sent direct to the work-site for installation/erection, etc.;

(iv) they also purchased parts/equipments fabricated by the other manufacturers out of the raw-materials and the designs supplied by them. These items are also sent directly to the work-site for erection and installation purposes;

(v) the manufacturers, who supplied the goods to the specifications and designs supplied by the petitioners are job-workers and are independent-manufacturers having their own factory and recognised as small-scale units;

(vi) that the job workers who supply the goods to the petitioners pay excise duty on their manufacture under the Act and are also exempted from duty as small-scale manufacturers wherever it is permissible, and,

(vii) that the petitioners while billing their customers, prepared consolidated invoice including all the items manufactured through job-workers and other charges - like, freight, insurance, etc. The said invoices also include design and commissioning charges also.

9. The show-cause notice is challenged by the petitioners on the following grounds :-

(i) there is absolutely no suppression of the material facts in regard to the goods got manufactured by the petitioners from outside agency and these facts were within the knowledge of the Department and that the Department had scrutinised, from time to time, various invoices and bills relating to the job-works;

(ii) that the petitioners are not liable to pay excise duty on the value of the goods supplied by the job-workers, who are independent contractors, and the demand made is contrary to facts and the law settled by the Supreme Court and the High Courts;

(iii) the impugned notice is barred by time and the proviso to Section 11A is not applicable to the facts of the petitioners' case, since no fraud, suppression or misstatement is alleged in the show-cause notice.

10. The petitioners have also raised additional grounds and produced some documents in support of the additional grounds. The petitioners have contended that the work of erection and commissioning does not amount to manufacturing

of goods and that it is work-contract. It is unnecessary to deal with this contention since the department has made it clear in its statement that the department does not propose to impose duty on the value of the plant and machinery though the notice issued includes the entire value of all the goods covered by invoices issued by the petitioners to their customers and erection and commissioning charges, etc.

11. The case of the Department is that the petitioners got manufactured certain completed equipment through sub-contractors and they were dispatched directly to the work-site; that there has been a suppression of the value of those excisable goods got manufactured through their sub-contractors and those goods should be considered as goods manufactured by the petitioners themselves, since the modus operandi adopted by the petitioners was to supply raw-materials, design and specifications to the sub-contractors and get the goods manufactured by them and those goods were cleared directly to the site under petitioners' invoices. By adopting this device it is alleged that the petitioners evaded payment of duty on those manufactured items which were got done through their agents. It was also vehemently contended on behalf of the Department by Sri Ashok Haranahally, that the writ petitions should be dismissed in limine, since the petitioner has approached this Court at the stage of show-cause notice; that there was sufficient material collected by the Department from the seized books to indicate that the petitioner had indulged in large scale suppression and had evaded payment of excise duty. The writ petition was also opposed on the ground that there is prima facie case against the petitioners and it should be left to the adjudicating authority to give a finding on the several issues that arise in the case and this Court should not interfere with the show-cause notice.

12. Sri Ganesh, learned Counsel appearing for the petitioners along with Mr. M. R. Naik, advanced the following arguments in support of the several contentions raised in the writ petition challenging the validity of the show-cause notice. Elaborating the contentions, the learned Counsel argued that the petitioners' activity, namely - getting certain components and equipments manufactured by outside agency, namely, the sub-contractors and job-workers, does not automatically attract the levy of central excise duty. The argument of the learned Counsel is that the value of those goods got manufactured by the petitioners from others cannot be treated as petitioners' manufacture since they are all independent contractors or manufacturers on their own account. Though some parts and components are manufactured by the job-workers to the specifications, and design supplied by them and what is paid to the job-workers is only the job-charges or the labour charges; though the petitioners exercise substantial and extensive control over the job-workers, this alone would not lead to the inference that they are all petitioners' manufacture; that all the sub-contractors are assessed under the Central Excise Act on their clearances of excisable goods manufactured by them in accordance with the existing law.

13. The second aspect of the case, as argued by the learned Counsel is, that, the Department cannot initiate proceedings to treat the value of goods supplied by the job-workers as the petitioners' clearances, in the absence of any allegation made that the job-workers are sham or bogus. It is contended that the show-cause notice does not contain any allegation that the job-workers are all bogus or were mere agents of the petitioners.

14. One other ground urged in support of the argument to quash the show cause notice is, that it is barred by limitation since no allegation of fraud, collusion or wilful misstatement of facts, are made in the show cause notice and the show cause notice issued by invoking the proviso to Section 11A of the Act is, therefore, not sustainable in law.

15. It was lastly contended that the show cause notice is liable to be quashed for vagueness and lack of particulars. It is also demonstrated that the Department is not able to fix the actual value of the job-work and the differential duty on the alleged suppression by adopting the total value of all clearances (from the invoices) to demand the differential duty from the petitioners.

16. Per contra, the show cause notice was sought to be justified by Sri Ashok Haranahally, for the Central Government, relying on the several undisputed facts in the present case. It was argued that all the goods got manufactured by the petitioners should be treated as goods manufactured by the Petr. Co., and their value included in the assessment of the petitioners. The learned Counsel has also relied upon several decisions in which it was held that the goods got manufactured by the assessee through job-workers was considered and treated as assessee's manufacture. Reliance was placed mainly on the cases which arose in Maharashtra State where the manufacture and supply of cotton fabrics or textiles by an arrangements or agreement with the powerloom owners or societies, is very common.

17. On the arguments advanced by both sides, the following points arise for consideration :-

(i) whether on the facts and arguments advanced on behalf of the petitioners, this is a fit case to interfere with the show-cause notice and quash it ?

(ii) whether a prima facie case is made out by the Department in proposing to levy duty on goods got manufactured through sub-contractors ?

(iii) whether the show-cause notice is liable to be quashed on the ground of absence of allegations as to fraud and suppression and lack of particulars as to the actual evasion of duty ?

(iv) whether in the absence of allegation that the job-workers are all sham or bogus, the Department was justified in issuing the impugned demand notice ?

(vi) whether the show-cause notice is liable to be quashed on the ground of limitation under the proviso to Section 11A ?

18. I now deal with cases cited by both sides. The learned Counsel for the petitioners has relied upon the following decisions in support of his contentions :-

(1) R.K.H. Industries and another Vs. Union of India and another,

It was held on facts that mere supply of raw materials by Rallis India to the petitioners therein and the manufacture of fan guards by them, should not disentitle them to claim exemption under Notification No. 89/79.

(2) Hind Lamps Ltd. Vs. Union of India (UOI) and Others,

Held, on facts, that manufacture of bulbs and fluorescent tubes and supplies made with the trade marks like Phillips, Mazda, etc., which were customer-companies, was held to be its own manufacture as an independent manufacturer and not a dummy company.

(3) Astra Pavro Electronics (P) Ltd. v. Union of India - 1987 (31) ELT 641 (Bom.).

Held, manufacture and supply under the brand name of Philips, as manufacture on their own account.

(4) Bata India Ltd. Vs. Assistant Collector of Central Excise,

Held, goods manufactured with purchaser's brand name cannot be deemed to have been manufactured by the purchaser.

(5) P.M. Abdul Latif and Others Vs. Assistant Collector of Central Excise, Trichirapalli and Others,

Fabrication etc., done with the raw-materials supplied by the customers - BHEL, held, petitioners entitled to exemption as independent manufacturer in their own right.

The two decisions of Supreme Court in :

(i) Union of India (UOI) and Others Vs. Cibatul Limited, and

(ii) Joint Secretary to the Government of India and Others Vs. Food Specialities Ltd., , were also referred to in this context.

19. In Cibatul case, the question was whether the goods manufactured by Cibatul Ltd., and supplied to Ciba Geigy of India Ltd., several products such as U.F. Resins etc., in accordance with the buyer's standards and with the trade mark of the buyer, could be treated as manufacture of the buyer and whether the seller had manufactured the goods on behalf of the buyers.

The Supreme Court held, on facts, that the seller, viz., Cibatul Co., was an independent manufacturer on its own account and had sold the goods to the buyer with their trade mark affixed on them. Hence, the department's decision to treat the wholesale price of the buyer as the wholesale price of the seller (Cibatul) was set aside and the High Court's order upheld.

20. In Food Specialities" case the only question was whether the value of goods sold by Food Specialities Co., to Nestle's should include the value of trade mark. The Supreme Court negated the contention of the Department that the value of trade marks should be added to the wholesale price of the respondent charged to Nestle's, for purposes of computing the value of goods manufactured by the Respondent-Company.

21. The second point is about the infirmity in the show cause notice viz., absence of allegations of suppression, fraud or collusion, misstatement etc., in the show-cause notice. The learned Counsel has cited two decisions of the Supreme Court on this point, viz.,

(i) Collector of Central Excise, Hyderabad Vs. Chemphar Drugs and Liniments, Hyderabad,

(ii) Padmini Products Vs. Collector of Central Excise, Bangalore,

22. The arguments advanced relying on these two decisions is that the show cause notice in the present case does not satisfy any of the ingredients of the provisions of Section 11A of the Act and hence, the show cause notice is liable to be quashed to this ground.

23. Reliance is also placed on the observations made by the Supreme Court in Union of India (UOI) and Others Vs. Madhumilan Syntex Pvt. Ltd. and Another, ; that the notice should contain the basis for the short levy and the notice merely asking the assessee to show cause against determination of the short levy without disclosing the grounds to alter the classification list, on the basis of which the short levy is alleged, would be bad in law. The Supreme Court also observed that any notice issued under the proviso to Section 11A should contain allegations of fraud, collusion or wilful mis-representation or suppression of facts, etc., as contemplated in the proviso. On this view, the Supreme Court struck down the show-cause notice.

24. The decision of this Court in Victory Glass and Industries Ltd. Vs. Collector of C. Ex., is also relied upon by the petitioners urging this court to interfere at the stage of show cause notice and quash it. It was pointed out by Sri Ganesh that this court interfered to prevent harassment to the petitioner pursuant to the show cause notice issued to the petitioner in that case which was found to be vague and vexatious.

25. The learned Standing Counsel for the Central Government has, in reply, relied upon the following decisions in support of the contention that there has been a suppression of the value of the articles got manufactured through the job-workers. They are :

(1) Jamnalal v. C.L. Nangia - AIR 1965 S.C. 215.

(2) Shree Agency v. S.K. Bhattacharjee - AIR 1972 S.C. 780 : 1977 (1) ELT 168 (SC).

(3) Gopal v. Mr. Balkundri

(4) Ramniklal v. Jaiswal 986 (25) ELT 609 (SC)

In all these cases the Supreme Court and the Gujarat High Court in the last case concluded, on the facts of each case, that the appellants before them were the real manufacturers and had employed powerloom owners/societies as a camouflage.

26. In the first case, there was an agreement between the petitioner and society for supply of powerloom cloth to the petitioner and the petitioner was to meet the cost of yarn to be purchased by the society and paid manufacturing charges to the society. It was, therefore, held that the authority was right in recording a finding that the petitioner was a manufacturer in respect of the goods produced by the societies.

27. In the second case, it was held, that Shree Agency - AIR 1972 S.C. 780, was the actual manufacturer of cotton fabrics through the agency of powerloom weavers and got manufactured on their behalf.

28. The third case also was a case of manufacture of cloth by powerloom owners who were employed by the petitioner to weave the cloth and return it to the petitioners.

29. In the last case of Gujarat High Court also, the petitioner had entered into agreement with the co-operative weavers' society to supply yarn and get the cloth back on the society being paid only the manufacturing charges. It was held, that it was a device to avoid excise duty though the society was an independent contractor.

30. From an analysis of the decisions relied upon by the petitioners the ratio of the several cases that may be summed is :

(i) that mere supply of raw-material to job-workers will not make the petitioner, a manufacturer of the goods manufactured by job-workers;

(ii) using brand name of the customers will not render the independent contractors mere dummies;

(iii) that the Department must prove that the job-workers are not manufacturers on their own account.

31. The Department has, on the other hand, tried to drive support from the line of cases dealing with manufacture of cloth by societies and powerloom weaver in support of the contention that the job-workers in the present case also must be held as mere camouflage.

32. This line of cases were decided on the special facts involved in those cases, viz., that the assessee had entered into agreements with the powerloom owners and societies for the manufacture and supply of the textile fabrics and the finding of the Court was that it was a device to avoid central excise duty.

33. These decisions, therefore, do not help the Department's case and the Department has to independently establish that such an arrangement was entered into between the petitioner and the job-workers, in the instant case, to evade payment of excise duty.

34. After a careful consideration of all the materials on record, the elaborate arguments advanced by both sides and the case law, I am of the opinion that the inference that can reasonably follow are these :-

(i) That the Department has not been able to establish that the petitioners have suppressed the fact of manufacture of excisable goods through their sub-contractors out of the raw material and on the specifications supplied by them and have evaded payment of duty on those goods;

(ii) that there is no tangible basis for the Department's assumption that all the goods the petitioner company got manufactured through their sub-contractors/ job-workers should be treated as the petitioners' manufacture;

(iii) that the Department has not established that any or all the job-workers, who supplied the goods to the petitioner-company are not manufacturers on their own account and that they are mere dummies and are bogus concerns;

(iv) there is no break-up given in the abstract of figures furnished by the department as regards the exact value of articles got manufactured through job-workers and the basis for the demand to pay differential duty is vague and uncertain;

(v) the mere fact that the job-workers delivered the components and equipments directly to the work spot and that the petitioners presented a consolidated invoice to their customers will not automatically lead to the inference that the value of all the invoices should be value of excisable goods deemed to have been manufactured by the petitioner-company; and

(vi) lastly the show cause notice issued demanding excise duty for the period 1-5-1981 to 28-2-1986 does not satisfy the ingredients to invoke the extended period of limitation, viz., suppression, fraud or wilful misstatement of facts.

35. I am not convinced, on facts, that the Department has succeeded in proving that the goods got manufactured by the petitioner-company, through the job-workers and independent sub-contractors, should be treated as manufacture by the petitioner-company and the petitioner-company has evaded to pay duty on the value of those goods.

36. For the reasons stated above, I hold the Department has failed to make out a prima facie case to uphold the show-cause notice and to permit them to continue with the further proceedings of adjudication pursuant to the said show cause notice. I therefore, accept the contentions of the petitioners, and, I am of the opinion that this is a fit case to interfere at the stage of the show-cause notice and quash the same.

37. In the result, Rule is made absolute and the show-cause Notice (Annexure - "O") (wrongly described as order in the petition), is quashed.