
(1988) 08 CAL CK 0008
In the Calcutta High Court
Case No : Matter No. 790 of 1983

Ashoka Industries

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 10-08-1988

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11B
Constitution of India, 1950 — Article 226
Contract Act, 1872 — Section 72
Customs Act, 1962 — Section 27
Customs Tariff Act, 1975 — Section 15
Limitation Act, 1908 — Article 96

Citation : (1988) 38 ELT 3

Hon'ble Judges : Baboo Lall Jain, J

Bench : Single Bench

Advocate : Bhanu Bhusan Chakraborty, for the Appellant; Roy Choudhury, for the Respondent

Judgement

Baboo Lall Jain, J.—The Petitioner, Ashoka Industries, imported 15 consignments of "Stainless Steel Strips and sheet Cuttings in length mixed sizes and thickness, 18/8 quality non-Magnetic Clean New Arising 4" to 15" wide mixed 3" to 8" long 14 to 30 SWG Mixed". These consignments were assessed to duty under and at the rate prescribed in Item No. 73.15(2) of the First Schedule to the Customs Tariff Act, 1975. The case of the petitioner is that the petitioner under mistake, paid the duty in respect of the said stainless steel sheet cuttings under Tariff Item No. 73.15(2), whereas in fact, the duty was leviable under Tariff Item No. 73.15(1). As there was lot of difference in duty, between the said two items viz., 73(15)(1) and 73.15(2), the case of the petitioner is that if a correct duty would have been charged as per the classification, as alleged by the petitioner, there would have been a difference of Rs. 3,08,679.81 p. In other words, the petitioner alleges that it has paid the aforesaid amount as excess duty and the petitioner is entitled to get a refund of the same.

2. On 11th October 1982, the petitioner made an application for refund of the said amount and no order is writing was sent to the petitioner. Thereafter, it is alleged that on or about 11th May, 1983, the petitioner came to know that the petitioner's application for refund was rejected. This fact is alleged to have come to the knowledge of the petitioner pursuant to oral enquiries. The petitioner filed this writ petition on or about 8th June, 1983, when a rule was directed to be issued as prayed for and an interim order was also made directing the Collector of Customs to refund the amount of Rs. 3,08,679.81 p. upon furnishing a bank guarantee by the petitioner in favour of the Collector of Customs.

3. I understand that such bank guarantee was duly furnished and the same is still subsisting in favour of the Collector of Customs. The petitioner prays that the Collector be directed to refund to the petitioner the said sum of Rs. 3,08,679.81 p. which, according to the petitioner, was paid by mistake of law.

4. Be that as it may, the broad questions that arise, for consideration, are, whether the excess amount of duty was wrongfully or illegally levied and, if so, was the claim of the petitioner barred by limitation.

5. In order to appreciate the controversies raised one has to see what are the relevant provisions. Section XV, Chapter 73. 15 of the First Schedule to the Customs Tariff Act, at the relevant time provided as hereunder:-

Heading	Sub-heading	No. of article	Rate of duty (b)	Central No. and description (a)	Standard Excise	Preferential Tariff areas	Item
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"73.15 Alloy Steel and high carbon steel in the forms mentioned in Heading Nos. 73.06/07 to 73.14: (1) Not elsewhere (a) 60% specified (2) Coils for re-rolling (a) 300% ,strips, sheets and plates of stainless steel".

It is to be noted that the rate of duty for strips, sheets and plates of stainless steel is 300%, whereas if the goods imported fall in the residuary category then the duty at the relevant time was 60%.

The definitions of "hoop and strip" sheets and plates" and "angles, shapes and sections" have been given in Notes 1(m), 1(n)and 1(r), respectively which read as follows :

"1(m) "hoop and strip" (Heading No. 73.12) : rolled products with sheared or an sheared edges, of rectangular sections, of a thickness not exceeding 6 millimeters", of width not exceeding 500 millimeters" and of such dimensions that the thickness does not exceed one-tenth of the width, in straight strips, coils or flattened coils".

"1 (n). Sheet and Plates (Heading No. 73.13: rolled products [other than coils for re-rolling as defined in paragraph (k) above] or any thickness and if in rectangles of a width exceeding 500 millimeters.

Heading No. 73. 13 is to be taken to apply, inter alia, to sheets or plates which have been cut to non-rectangular shape, perforated, corrugated, channelled, ribbed, polished or coated, provided that they do not thereby assume the character of articles or of products falling within other Headings".

"1(r) "angles, shapes and sections" (Heading No. 73.11) : Products, other than those falling within Heading No. 73.16 which do not conform to the entirety of any of the definitions (h), (i), (j), (k), (l), (m), (n), and (o) above, and which do not have cross-sections in the form of circles, segments of circles, ovals, isosceles triangles, rectangles, hexagons, octagons or quadrilaterals with only two sides parallel and the other two sides equal, and which are not hollow".

6. The item imported by the petitioner was described as stainless steel strip and sheet cuttings in length mixed sizes and thickness and it was also described as new arising 4" to 15" wide mixed 3" to 8" long and 14 to 30 SWG mixed it was contended that the goods imported were not of the category, as described in item No. 73.15(2). The said Item 73. 15(2) includes the words strips, sheets and plates of stainless steel. Since the width of the materials was 4" to 15" then the same could not possibly fall in the category of "strip" because the maximum width permitted is 500 millimeters and it has to be of rectangular section in straight strips. Whatever strips cuttings were there in the consignment the same could not come within the definition of strips, which limits the width to 500 mm. i.e., roughly 5 centimeters which in turn is equivalent to 2". Then the question arises whether the sheet cuttings imported, came within the category of "sheets and plates". The definition of sheets and plates, as referred to above, includes the products in rectangular and non-rectangular shapes. Ordinarily the word sheet applies to rectangular "shape or originally the sheets are produced in rectangular shapes as mentioned in the first portion of the definition. Even if a sheet is less than 500 mm in width then also it will not come within the definition of sheet, because the first portion of the definition excludes the same from the definition. The second portion of the said definition has included, in the definition, by using the words The heading is taken to apply to sheets which have been cut to non-rectangular shape". This means and implies the sheet as cut to the particular shape i.e. non-rectangular shape", then the product coming into existence by means of such process of cutting will come within the said definition. This implies the product made by cutting, in a non-rectangular shape.

7. The petitioner relied on the Public Notice No. 22-ITC (PN)/81 dated 29th April, 1981, issued by the Ministry of Commerce, for import policy 1981 -82 in which sheet cuttings have been placed in the list of banned items and stainless Steel Sheet has been placed in the list of canalised items. This shows that stainless steel sheet cuttings are different from stainless steel sheets. The said notification has been issued by the Union of India. The petitioner is also relying on the letter dated 9th November, 1981 from the Steel Authority of India Ltd., which is also a Government of India undertaking and wherein sheet cuttings are categorised separately from sheets. The petitioner is also relying on the letter dated 9th

February, 1982, written by the Steel Authority of India Limited wherein different rates are shown for "end cuttings" and "sheet cuttings". In paragraph 4 of the petition it has been stated as follows :-

"The sheets, plates and strips mentioned in Tariff Item No. 73.15(2) are defined as "Rolled Products". Rolled Products means an end product of a manufacturer manufactured by process of rolling, and it does not cover any arisings, off-cuts, waste, scraps which are not intended end-products but automatically arise during the manufacture of a primary product. The cuttings imported by your petitioner are not rolled products/end-product itself, and as such they cannot come within the definition of strips, sheets, and/or plates. In fact, the cuttings are off-cuts, which arise in the usual course of manufacture of rolled products. They are waste material and they do not have any uniformity in either their size i.e. length, width and thickness.

8. In the affidavit-in-opposition being the affidavit affirmed by Bhanu Bhusan Chak-raborty on 16th February, 1984, the said Mr. Chakraborty dealing with the said paragraph, states in paragraph 10 as follows :-

"10. With further reference to paragraph 4 of the petition I deny that the said goods are waste materials as alleged".

9. The said Bhanu Bhusan Chakraborty is not denying the fact that the cuttings are off-cuts which arise in the manufacture of rolled products, and they do not have any uniformity in either their size, i.e. length, width or thickness. This fact also appears from the description of the items imported as given in the Bills of entry.

10. This also shows that arisings and off-cuts are not intended end products but automatically arise during the manufacture of end products. This fact also is not denied. Furthermore the aforesaid documents issued by the Union of India and/or its undertakings clearly show that sheet cuttings are different from sheets and are classified as such.

11. The word cutting has a meaning attached to it. When sheets are produced there are ends which are not of the rectangular quality or of standard guage, and as such they have to be cut as an arising out of the main product, which is, sheet. Similarly out of the sheets many items may be produced which are either in the shape of rectangles or which are cut to non-rectangular shapes". A non-rectangular sheet may include circles, segments of circles, ovals, isoseles triangles, rectangles, hexagons, octagons or quadrilaterals. Whenever such forms are cut out of the sheets then also certain cuttings which are not the end products, arise and they are described as cuttings or arisings.

12. From the description given in the bill of entry it is quite clear that the goods imported were cuttings and they were arisings and not the end product. They were also of mixed sizes both in length and in width and also in guage. As already observed above it cannot be said that the cuttings had any particular

regular form because they really do not represent an end product, that is, sheet in rectangular shapes or forms. Cuttings are the necessary arisings when the end product as specified in the definition clause 1 (n) of the Notes is produced.

13. Mr. N.C. Roy Choudhury appearing for the respondents contend before me that whatever may be the form if the particular commodity comes out of a sheet, then it is deemed to be included in the category of sheet. His contention was that a sheet would include anything which comes out of a sheet.

14. This contention, however, is not correct inasmuch as a sheet if in rectangle and having a width less than 500 mm. will not come within the definition "sheet" and "plates" because the definition itself excludes the same from out of the category of sheet. Furthermore, the definition shows that the sheet may be either in the form of rectangle or it may be cut in to a non-rectangular shape. The other portions of the definition, namely, use of the words "hot rolled products" and also use of the words sheets" which have been cut to non-rectangular shape, imply that the commodity should be either a sheet or a sheet product cut into non-rectangular form. If any cuttings come out in the production of end products, then the same does not come within the definition of Item 1 (n) of the notes, but the same will come in the definition of Item 1 (r) which defines "angle shapes etc.". The said item will include every irregular shape which does not come within item No. 1 (n).

15. Item 73.15 of the First Schedule states that the alloy steel and high carbon steel should be in the form mentioned in headings 73.06/07 to 73.14. Item 73. 11 is angles, shapes and sections, Items 73. 12 is hoop and strip and 73. 13 is sheets and plates. For the purpose of the assessment of the duty in case of alloy steel and high carbon steel, form of the commodity must be one of the forms as specified in the Item No. 73.06 to 73. 14. So far as 73. 15(2) is concerned it does not include angles, shapes and sections.

16. Mr. Roy Chowdhury relied on the judgment of the Division Bench of the Delhi High Court in the case of Super Traders and another Vs. Union of India and others, . In that case the item imported was stainless steel circle. In that case it was contended by the writ petitioner that a circle did not come within the definition of sheets and plates. There the Division Bench of the Delhi High Court consisting of Mr. Justice Rajinder Sachar and Mr. Justice R.N. Agarwal held that the stainless steel circle really means sheet cut out to non-rectangular shape. The contention of the petitioner that non-rectangular does not mean circle was not accepted. I respectfully agree with the observations made in the said judgment that a sheet cut to any form will be included within the word "non-rectangular". However, so far as arising and/or cuttings are concerned, the same is not the rolled product and the same does not have any regular size or form. A rising and/or sheet cuttings would come in the category of "Angles, shapes and sections" and not within "sheets and plates" which includes the rolled products in the prescribed forms. The definitions given in Items 1 (m), 1 (n) and 1 (r) make it clear that the item imported by the petitioner would not come within the

definition of sheets and plates, but it will come within the definition of angles, shapes and sections. Sheet cuttings do not in my opinion, come within the definition of strips, sheets and plates as they are not rolled products. The contention that, anything which comes out of the sheet, must come within the definition of the word "sheet" cannot be accepted in view of the definition of the words "sheet and plates" in note 1 (n). If that would have been so, the definition could be made very simple by using the words "sheet in any form". As already stated above, a sheet even if it is in rectangle shape, but of a width less than 500 mm is specifically excluded out from the definition of a sheet. Undoubtedly the forms of the items imported are important, as would appear from the said Item No. 73. 15. The statute itself has made, from as the basis for categorization between of 73. 15(2) and 73. 15(1). If item does not come within the definition of 73.15(2), then the customs duty at the relevant time, stood reduced from 300% to 60%. From the Census Custom's Tariff 1983-84, it appears that the customs duty of 73.15(1) and 73.15(2) was levied at 300% for each item.

17. Mr. Roy Chowdhury also relied on the judgment of the Supreme Court in the case of V.V. Iyer of Bombay Vs. Jasjit Singh, Collector of Customs and Another, . Relying on the earlier judgment, the Supreme Court held that it is primarily for the Import Control Authorities to determine the head of entry under which any particular commodity fell, but if in doing so these authorities adopted a construction which no reasonable person could adopt i.e., if the construction was perverse then it was a case in which the Court was competent to interfere. In other words, if there were two constructions in which an entry could reasonably be and one of them in favour of Revenue was adopted, the Court had no jurisdiction to interfere merely because the other interpretation favourable to the subject appeals to the Court as the better one to adopt.

18. Mr. Roy Chowdhury also relied on the judgment of the Supreme Court in the case of The Collector of Customs, Madras Vs. K. Ganga Setty, , in support of the aforesaid proposition. The conclusion or decision of the Customs Authorities could not in that case be characterised as perverse or malafide. There a quantity of oats was imported and the same were described as "Standard food oats". Oats could come in the category of grain as well as in the category of feed and the Supreme Court held that it is primarily for the Import Control Authorities to determine the head of entry under which any particular commodity fell, but that if in doing so, those authorities adopted a construction which no reasonable person could come i.e. if the construction was perverse, then it was a case in which the Court was competent to interfere.

19. In the instant case, I am of the opinion that it was the duty of the Customs Authorities to properly classify the goods. In my opinion, if the different definitions were kept in sight, no reasonable person could include the said goods in the category of the Item 73. 15(2) and hence the same could only be included in the residuary item i.e. 73. 15(1).

20. It was next contended by Mr. Roy Chowdhury that an alternative remedy was

available to the petitioner and they having applied for the refund of the amount to the Customs Authorities should have followed the procedure prescribed by the Customs Act. Mr. Roy Chowdhury relied on the judgment of the Supreme Court in the case of Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others, . But the Court itself held in the said case that the remedy should be equally efficacious. In the instant case the tax has been collected otherwise than in accordance with law. In other words, it has been collected arbitrarily and/or illegally. If that is so then a wrong has been done to the citizen concerned. As reported in the judgment of the Supreme Court in the case of Shiv Shankar Dal Mills and Others Vs. State of Haryana and Others, . The Supreme Court held as follows :-

"The law *ubi jus ibi remedium*, becomes from this point of view something more important than a mere autological proposition. In its bearing upon constitutional law, it means that the Englishmen whose labours gradually formed the complicated set of laws and institutions which we call the Constitution, fixed their minds far more intently on providing remedies for the enforcement of particular rights or for averting definite wrongs, than upon any declarations of the Rights of Man or Englishmen...The Constitution of the United States and the Constitution of the United States and the ... the separate States are embodied in written or printed documents, and contain declaration or rights, but the statesmen of America have shown an unrivalled skill in providing means for giving legal security to the rights, declared by American Constitutions. The rule of law is as marked a feature of the United States as of England". "Another point, in our jurisdiction, social justice is a pervasive presence; and so, save in special situations it is fair to be guided by the strategy of equity by asking those who claim the service of the judicial process to embrace the basic rule of distributive justice, while moulding the relief, by consenting to restore little sums, taken in little transactions, from little persons, to whom they belong".

21. The petitioner also relied on the judgment in the case of Dilichand Shreelal Vs. Collector of Central Excise and Others, , wherein it was held that the limitation in a case of payment of duty under mistake is to be counted from the date the petitioner came to know about the mistake. The relevant portion of the said judgment is as follows :-

"The next contention which is required to be considered is Assuming that the period of limitation would be applicable, the question is whether the limitation as prescribed under the Act or the limitation as prescribed under the general law would be applicable. When the duty was imposed by the respondents on the product manufactured by the petitioner under Tariff Item No. 68, it was not known to the respondents on the product manufactured by the petitioner under Tariff Item No. 68, it was not known to the respondents that there was an exemption notification which entitled the petitioner to get exemption from duty. There was thus a mistake of law which is common to both the assessee and the taxing authority. In *State of Kerala v. Aluminium Industries Ltd.* reported in

(1965) 16 S.T.C. 689, Supreme Court (Bench consisting of 7 judges) held that money paid under a mistake of law comes within the word "mistake" in Section 72 of the Contract Act and there is no question of estoppel when the mistake of law is common to both the assessee and the taxing authority. If the tax is levied by mistake of law, it is ordinarily the duty of the State, subject to any provision of law relating to such tax, to refund the tax. If refund is not made, remedy through Court is open, subject to the same restriction and also to the bar of limitation under Article 96 of the Limitation Act, 1908, namely, three years from the date when the mistake becomes known to the person who has made the payment by mistake. It is the duty of the State to investigate the facts when the mistake is brought to its notice and to make refund if the mistake is proved and the claim is made within the period of limitation. The Supreme Court followed its earlier judgment in the case of *State of Madhya Pradesh v. Bhailal Bhai* (Supra)."

22. It was contended by Mr. Roy Chowdhury that Section 27 of the Customs Act provides for refund of duty. It was also contended that no claim for refund could be made otherwise than in the manner provided by the statute. A similar contention was made in the case of *Dulichand Shreelal v. Collector of Central Excise* (Supra) and the same was negatived. The learned Judge held as follows :-

"It is true that under the provisions of Section 11B of the Central Excises Act, the period of limitation has been prescribed for preferring the claim for refund and this cannot be over-ridden by the ordinary law of limitation. However, this principle will not apply when duty has been collected unlawfully."

"The contention that in a writ application generally refund is not ordered and the party is relegated to a suit is not tenable. It has nowhere been laid down that the High Court is powerless in appropriate case to direct refund under Article 226 of the Constitution, if such refund is otherwise due to the assessee. On the facts of the case, the petitioner is entitled to the relief inasmuch as it has been disputed that the duty was collected unlawfully whether it has been mistake or otherwise. The ground on which refund was rejected on the ground that the petitioner was not entitled to refund on merits. The extraordinary remedy under Article 226 of the Constitution is available on facts of this case and the question of relegating the petitioner to civil suit does not arise."

23. In the instant case the petitioner came to know about the mistake when the Customs Tariff Amendment Bill, 1982 came into force from 15th of April, 1982 and even if the limitation of six months is to be counted then also the application for refund was made on the 11th of October, 1982 and hence it cannot be said that the claim made by the petitioner is barred by limitation. In the case of payments made under mistake it cannot be said that the period of limitation will start running even before the mistake is discovered. The payments of duties were mostly made between 10th of March, 1980 to 3rd of April, 1980 excepting the first payment which was made on 14th of July, 1979. According to the petitioner, the mistake was discovered only from the objects and reasons of the

Amendment Bill of 1982. In my opinion, therefore, the claim of the petitioner was not barred by limitation.

24. The next contention that was sought to be raised by Mr. Roy Chowdhury was that the petitioner had passed on the burden of the duty on its customers and realised such duty from such customers. In the premises if any refund is ordered that will amount to unjust enrichment of the petitioner. No factual basis has been made out in the affidavit-in-opposition to raise such plea. Whether the petitioner realised customs duty as such from its customers is a question of fact and I do not find that such an allegation has been made in the affidavit in opposition and furthermore in the case of *Dulichand Shreelal v. Collector of Central Excise* (Supra). It has been held as follows :-

"It has been consistently held by the High Courts and the Supreme Court that if the collection is without jurisdiction then the plea of unjust enrichment cannot be advanced to deprive the persons who paid duty on the ground that the manufacturer had no intention to refund the same or on the ground of unjust enrichment. In the case of *D. Cawasji and Co.*, it was held that there is no provision under which the Court could deny refund of tax even if a person who collected it from a Customer and has no subsisting liability or intention to refund it to them or for any reason, it is impracticable to do so. If duty is collected without authority of law, the Department cannot retain the excess duty collected. It is under an obligation to return the excess duty and the petitioner has a corresponding legal right to recover it. In the instant case, the duty was collected without authority of law, the petitioner was entitled to amounts collected by the respondents."

25. In the case of *Assistant Collector of Central Excise and Ors. v. Madura Coats Ltd.*, reported in 1987 (33) E.L.T. 29 the Division Bench of this Court held as follows :-

"Excise Duty is an indirect tax and generally it is passed to the buyer. The law is well-settled that in case where collection of duty of tax is ultimately found to be illegal and without jurisdiction, the Government cannot hold on to the same and is bound to refund the same. Otherwise, it would amount to "unjust enrichment" by the department. However, the principle of unjust enrichment is to be applied not only against the department but against the assessee also e.g. where, though the assessee has paid the fees or fee or duty initially, yet he has passed the burden to his purchaser and he himself has not suffered any loss or prejudice in fact. Merely because the assessee has paid the money, that by itself is no ground for directing payment to the assessee, if in fact the assessee has not paid out of his own pocket, but ultimately passed it on to his purchaser. In the instant case, it is not the case of the assessee that they have not passed the burden to its purchaser. Accordingly, the appellants are directed to refund the amount of Excise duty collected by them from the respondents in the manner as indicated, namely that the sums are to be paid to the Receiver/Special Officer appointed by the Court for repayment to the purchasers, in accordance with the procedure as

detailed in the Court Order."

26. So far as the customs duty is concerned it cannot be said that it is generally passed on to the buyer. It is nowhere alleged in the affidavit in opposition that the petitioner realised or was entitled to realise from its customers the customs duty paid by him as such. The petitioner can sell its commodity on the basis of the ruling market price for the same. It may make profit or may incur loss. Unless the sale is on the basis of an agreed price plus customs duty actually paid, in my opinion it cannot be said that the petitioner realised the customs duty from its customers. In the absence of any allegation in the affidavit in opposition, I am not inclined to place any reliance on the arguments made from the Bar. Furthermore, and in any event I respectfully agree with the observations made in the judgment cited above on this point and, in my opinion, the respondents were not entitled to retain the excess amount of duty as realised by them.

27. In view of what has been discussed above, in my opinion, the respondents were and are liable to refund the said sum of Rs. 3,08,689.81 p. to the petitioner and the respondents are directed accordingly.

28. Since the same amount has already been refunded pursuant to the interim order dated the 8th June, 1983 the petitioner will be entitled to appropriate the same towards satisfaction of the claim made in the instant writ petition. So far as the order directing the petitioner to furnish the bank guarantee for the equivalent amount is concerned, the same will stand vacated and the petitioner and/or the petitioner's banker furnishing such bank guarantee will be entitled to withdraw the same immediately upon expiry of a period of four weeks from date. There will be no order as to costs.