
(1967) 02 CAL CK 0026

In the Calcutta High Court

Case No : Appeal from Original Order No. 138 of 1966

Assistant Collector of Central Excise and Others

APPELLANT

Vs

Sree Gobinda Glass Works Limited

RESPONDENT

Date of Decision : 23-02-1967

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : 72 CWN 137

Hon'ble Judges : D.N. Sinha, C.J.;Arun K. Mukherjea, J

Bench : Division Bench

Judgement

D.N. Sinha, C.J.—The facts in this case are shortly as follows: The respondent, who was the petitioner in the Court below, is a manufacturer of glass and glasswares and has his factory at Ramrajatala in the district of Howrah. Under the Finance Act, 1961 glass and glasswares became liable to pay Central Excise duty under the Central Excise and Salt Act, 1944 (hereinafter referred to as the "said Act"). Item 23A of the Finance Act, 1961 is in the following terms :

"23-A. GLASS AND GLASSWARE-

(1) Sheet glass and plate glass ..

Ten per cent, ad valorem.

(2) Laboratory glassware

Five per cent, ad valorem.

(3) Glass shells, glass globes and chimneys for lamps and lanterns ..

Ten per cent, ad valorem.

(4) Other glass-ware including tableware

Fifteen per cent, ad valorem.

It is admitted before us that we are not concerned with items Nos. 1, 2 and 3 but

only with item No. 4. In other words, the goods in the present case were subject to duty at the rate of 15% ad valorem. The petitioner company is a large scale manufacturer and obtained licence under the Central Excise and Salt Act. It appears that for the speedy payment of excise duty and clearance of goods, which under the said Act and the Rules framed thereunder, could not be removed without payment of duty, a procedure was adopted as follows: Before clearance of goods manufactured in the factory, the petitioner company used to submit in the prescribed form, known as A. R. I. form, the particulars of the goods to be cleared. In that form, the petitioner company gave the value of the goods upon which the duty was to be calculated. The value of goods under the Excise Act and the Rules read with the Finance Act, 1961 is an amount which is capable of being calculated. Roughly speaking, it is the market value, in the nearest wholesale market. At that stage, the authorities could not verify the correctness of the amounts stated, and so they accepted the valuation given and assessed the petitioner company on the valuation so given, which was in accordance with the price list that was prepared from time to time and at the bottom of the said price lists, there was an endorsement by and on behalf of the petitioner company, as follows:

"We bind ourselves to pay the differential rate of duty if found otherwise on verification."

2. We are concerned in this case with two periods, namely, from June 1, 1961 to September 25, 1961 and September 26, 1961 to April 30, 1962. During this period, the petitioner company obtained clearance of a large quantity of glass and glasswares and during this time the procedure mentioned above was followed. During the period, the petitioner company kept a sum in deposit in current account with the Central Excise authorities and when a particular lot of goods was allowed to be cleared, this account was debited. On November 16, 1962 and January 16, 1963 two notices were issued, copies whereof are set out at pages 16 and 17 of the paper book. These two notices are headed as --"Notice of Demand for duty under Rule 9B of the Central Excise Rules, 1944." In the respective notices, demand was made for payment of a sum of Rs. 35,125.31 P. and Rs. 67,567.95 P.-- "towards differential Central Excise duty due to difference in prices". Payment was demanded within ten days.

3. On receipt of these notices, the petitioner company objected, and the Assistant Collector thereupon sent two separate replies confirming the demands. These are dated 23rd February, 1963. Thereupon, the petitioner company moved this court under art. 226 of the Constitution, praying for a Writ of Certiorari for quashing the two notices of demand as well as the two confirmation orders and for calling upon the respondents to recall, cancel or withdraw the demands, and for other reliefs. In order to appreciate the point that arose for decision in the Court below and before us, it is necessary to refer to three rules contained in the Central Excise Rules. They are Rules 9B, 10 and 10A. The provisions of these Rules are set out below:

"9B. Provisional assessment to duty -- (1) Notwithstanding anything contained in these rules, a manufacturer, curer or owner of goods warehoused may in cases where assessment of goods involves two or more alternative basis, request the proper officer to assess the goods provisionally at lower of the lowest of the rates of duty applicable--

(a) pending furnishing by such manufacturer, curer or owner of complete information as regards the value, description or quality of the goods or if such information has already been furnished, pending supply of proof there-for, or

(b) pending completion of any chemical or other test to which the goods may be subjected by such officer, and such officer may, at his discretion, direct that duty on such goods may be provisionally assessed and prescribe the time limit within which the complete information, or proof of the information already furnished shall be supplied by such manufacturer, curer, owner in res-pact of the goods so assessed.

(2) Such manufacturer, curer or owner shall execute a bond in the proper Form, with such surety or sufficient security, in such amount, or under such conditions as the Collector approves, binding himself for payment of the difference between the amount of duty as provisionally assessed and that as finally assessed on receipt of such complete information or proof therefor, or of results of chemical or other tests made in respect thereof.

(3) The Collector may permit the manufacturer, curer or owner of warehoused goods to enter into a general bond in the proper Form with such surety or sufficient security in such amount or under such conditions as the Collector approves for assessment of any goods provisionally from time to time.

Provided that, in the event of death, insolvency or insufficiency of the surety or where the amount of the bond is inadequate, the Collector may, in his discretion, demand a fresh bond, and may, if the security furnished for a bond is not adequate, demand addition-al security.

(4) The goods provisionally assessed under sub-rule (1) may be cleared for home consumption or export in the same manner as the goods which are not so assessed.

(5) When the duty leviable on the goods is assessed finally in accordance with the provisions of these rules, the duty provisionally assessed shall be adjusted against the duty finally assessed, and if the duty provisionally assessed, falls short of, or is in excess of the duty finally assessed, the manufacturer, curer or owner of the goods, shall pay the deficiency or be entitled to a refund, as the case may be.

10. Recovery of duties or charges short-levied or erroneously refunded.-- When duties or charges have been short-levied through inadvertence, error, collusion or mis-construction on the part of an officer, or through mis-statement as to the quantity, description or value of such goods on the part of the owner, or when

any such duty or charge, after having been levied, has been owing to any such cause, erroneously refunded, the person chargeable with the duty or charge so short-levied, or to whom such refund has been erroneously made shall pay the deficiency or repay the amount paid to him in excess, as the case may be, on written demand by the proper officer being made within three months from the date on which the duty or charge was paid or adjusted in the owners account current, if any, or from the date of making the refund.

10A. Residuary powers for recovery of sums due to Government.--Where these Rules do not make any specific provision for the collection of any duty, or of any deficiency in duty if the duty has for any reason been short-levied, or of any other sum of any kind payable to the Central Government under the Act or these Rules, such duty, deficiency in duty or sum shall, on a written demand made by the proper officer, be paid to such person and at such time and place, as the proper officer may specify."

4. The case on behalf of the appellants in the Court below was that there was a provisional assessment of duty under Rule 9B and as there was a short-fall found later on, notice was given under the said Rule asking for payment of the amount found due. It will be observed that the two impugned notices are entitled as having been made under Rule 9B. The learned Judge in the Court below has gone into the facts and has held that there was no provisional assessment under Rule 9B, and therefore, the notices were invalid.

5. It is not disputed that assessment and provisional assessment of duty under the said Act and Rules read with the relative Finance Act can only be in accordance with the statutory provision. These are not common law rights and, therefore, a provisional assessment can only be made in accordance with the provisions Rule 9B, because no other provision in the Act or the Rules have been brought to our attention which enables a provisional assessment to be made. Rule 9B makes it clear that a manufacturer, curer or owner of goods warehoused may ask for provisional assessment only in a case where the assessment of the goods involves "two or more alternative basis." In such a case, he can request the proper officer to assess the goods provisionally at a lower or the lowest of the rates of duty applicable, pending the furnishing by such manufacturer, curer or owner, of complete information as regards the value, description or quality of the goods or if such information has already been furnished, then pending supply of proof therefor or pending completion of any chemical or other test to which the goods may be subjected by such officer. Provided that these preconditions are observed, the officer may, at his discretion, direct that duty on such goods may be provisionally assessed and prescribe the time-limit within which the complete information, or proof of the information already furnished shall be supplied by such manufacturer, curer or owner in respect of the goods assessed. Upon this being done, the manufacturer, curer or owner shall execute a bond in the proper form, with such surety or sufficient security or under such conditions as the Collector approves. The Collector may permit the manufacturer, curer etc,

to enter into a general bond. The goods provisionally assessed may be cleared for home consumption or export in the same manner as the goods which are not so assessed. When the duty leviable on the goods is assessed finally, then the manufacturer, curer etc, as the case may be, shall pay the deficiency or be entitled to a refund. As I have stated above, the impugned notices purported to be made under Rule 9B, and upon the respondent to make payments of the deficiency under sub-rule (5) of Rule 9B. The learned Judge in the court below has held that all the elements that are required for the purposes of Rule 9B are absent in this case. We agree with this finding. Firstly, the fundamental requirement is that the assessment of all goods must involve "two or more alternative basis." In this particular case, the entire goods are liable to duty at a fixed rate of 15% ad valorem. Therefore, this basic requirement has not been fulfilled. Mr. Bhabra has argued that we can say that there are two or more alternative basis, because although the rate is constant, the value may differ. In other words, that the amount of tax calculated at the rate on the value of the goods disclosed may be different when it is found that the value disclosed is not correct. In such a case calculating at the same rate, the value will be different and this will be an alternative basis. In our opinion, this argument cannot be accepted. Two different amounts of tax payable can be arrived at upon the same basis of calculation, upon two values, one being the correct value and the other being the incorrect value. Here there is no "alternative" basis. I have set out above, Item 23A of the Finance Act, 1961. It will be found that there four items mentioned there which deal with different classes of glass and glasswares, which have different rates ranging from 5% to 15% ad valorem. I could have understood if there was any question of goods coming under one item or the other thus being subject to the "lower" rate or of the "higher" rate. If this was the dispute, and it was stated that provisional assessment be made, pending determination of the heading under which the assessment was to take place, and in the meanwhile the assessment to be made at the lowest rate; that would be understandable and would be a proper subject for provisional assessment under Rule 9B. Such, however, is not the case here. It is admitted that only item No. 4 is concerned, or in other words, the rate is a fixed one, namely, 15% ad valorem. That the alternative basis is wedded to rates is obvious from the penultimate wordings in sub-rule (1) of Rule 9B, which speaks of "request the proper officer to assess the goods provisionally at lower or the lowest of the rates of duty applicable". In our view, the fundamental basis of Rule 9B does not exist in this case and there is no question of two or more "alternative" basis, and therefore, no question of provisional assessment can arise. Further, the procedure laid down by Rule 9B was not followed at all. There is no request on behalf of the petitioner company to the "proper officer", to assess the goods provisionally at lower or the lowest of the rates of duty applicable. There is no order by the proper officer that the goods may be provisionally assessed; no time has been prescribed within which complete information or proof of the information furnished shall be supplied by the manufacture Mr. Bhabra, however, draws our attention to the fact that a bond was executed. With regard to the bond, the matter seems to be

somewhat confused. Mr. Bhabra referred us to page 46 of the paper book where the Assistant Collector of Central Excise, Calcutta II Division, wrote to the petitioner company that the B-13 (Gen. Sur.) Bond for Rs. 5,000/- with the surety of M/s. R. N. Jhunjhunwala & Co. (P) Ltd. of 9, Ezra Street, Calcutta, executed on the 6th July, 1961 will not serve the purposes, as a Bank Guarantee was required. The Company was, therefore, requested to execute a fresh bond with a Bank surety. The original bond has not been produced before us and we do not know what goods it relates to and for what period. We have, however, another bond before us which was executed by the petitioner company dated the 26th September, 1962 which is at pages 48 to 50 of the paper book, Here again, neither the particulars are mentioned nor the period for which the bond was given. In the body of the bond it is stated as follows:

"And whereas the obligors as per provisions contained in Rule 9B of the Central Excise Rules, 1944, have requested the Governments to make pro-visional assessment of Excise Duty of the said goods pending final assessment."

6. Prima facie, this seems to be prospective, that is to say, referable to a period when the provisional assessment has not yet been made, because a request is recited for making such provisional assessment. Upon these facts, we have to come to a decision as to whether there has been a provisional assessment under Rule 9B which would justify the issuing of the impugned notices. As I have stated above, the fundamental basis of Rule 9B, that is to say, the circumstance under which alone a request for a provisional assessment can be made and complied with, is absent in this case. Therefore, even if the parties proceed on a mistaken notion that a provisional assessment could be made, it cannot be said that a provisional assessment has, in fact, been made under Rule 9B so that a notice can be given under sub-rule (5) thereof. Let us see, what has happened in this case. Goods were allowed to be cleared. There is no doubt that the procedure adopted was one for facilitating the turnover of goods, that is to say, to prevent the accumulation of a large amount of stocks in the factory premises. But what really happened was that Government was accepting the value put forward on behalf of the petitioner company, taking from it an undertaking to pay the deficiency. But this does not make the assessment a provisional assessment under Rule 9B. Provisional assessment under Rule 9B is a statutory matter and must come within its four corners. One might call an assessment "provisional" in the larger or the dictionary sense, but that will not make it a provisional assessment under Rule 9B. Apart from this fundamental defect, we are asked to excuse the absence of a request for provisional assessment or the laying down of the prescribed time limit within which information etc. should be given, or the passing of an order for provisional assessment, and to hold that the parties proceeded and intended to proceed and did, in fact, comply with the provisions of Rule 9B. This is not possible. The only definite thing that has been shown to us is the execution of the bond. As I have stated above, the matter about bond is confusing, be-cause sufficient materials are not before us. So far as the first bond is concerned, it has not been produced and only a reference has been made

in the letter. As regards the second bond, it is not clear on the face of it as to whether it is meant to be prospective or retrospective. The learned Judge has looked at the second bond and has said that it does not refer to the period in dispute. That may or may not be so. In our opinion, on the materials before us, it would be extremely risky to come to any decision on the question of the bonds. Apart from the bonds, there has been clearly no conformity with the provisions of Rule 9B and we agree with the findings of the Court below that there has been no provisional assessment under Rule 9B and consequently, notices cannot be served under sub-rule (5) of Rule 9B. The impugned notices in so far as they purport to do so are invalid. A further question was considered in the Court below as to whether the matter could come under Rule 10 or Rule 10A. It was urged on behalf of the appellant that Rule 10 applied, whereas the learned Judge held that it came under Rule 10A and was consequently barred by limitation. In our opinion, it was absolutely unnecessary in this application to go into the question as to whether Rule 10 or 10A applied. The impugned notices were given under Rule 9B and the demand was obviously made under sub-rule (5) of Rule 9B. There-fore, if we find that there was no provisional assessment under Rule 9B, it is sufficient to quash the notices and the two letters which confirm them. On the materials before us, it does not seem proper that the other questions should be decided, namely, as to whether Rule 10 or 10A applied. If and when the appellants proceed under either of these Rules, that will be time enough to consider the validity thereof. In order to decide whether the matter comes under Rule 10 or 10A, many other facts have to be taken into consideration. As I have said, some of the facts, for example, about the bonds, are not available at present. We, there-fore, propose to uphold the finding of the Court below with regard to Rule 9B and keep the matter open with regard to Rules 10 and 10A. The appellants have expressly issued their demand notices under Rule 9B. If these are quashed, they will proceed to take such steps as they may be advised, either under Rule 10 or 10A or otherwise, and thereupon the respondent will take such objections as it may be advised. That aspect of it should not be prematurely decided in this case. The order that we will make is :

We confirm the findings of the Court below on the interpretation of Rule 9B and hold that there has not been a provisional assessment in this case under that Rule, and therefore, the impugned notices and the two letters confirming them are bad and are, therefore, quashed by an appropriate writ and the appellants are restrained by an appropriate writ from interfering with them or giving any effect thereto. The part of the judgment of the Court below which relates to Rules 10 and 10A is set aside and the point is kept open, namely, as to whether the appellants have any right to proceed, other than under Rule 9B. Our findings will be without any prejudice to such proceedings that may be brought in future. That part of the order which says that the current account of the petitioner company must be readjusted if any debits had been made in respect of the sums covered by the notices will remain, but will be without prejudice to any adjustments that may be made in future apart, from the alleged provisional

assessment under Rule 9B.

We make no order as to costs.

Arun K. Mukherjea, J.

7. I agree.