

(1977) 01 CAL CK 0005

In the Calcutta High Court

Case No : F.M.A. No's. 414 of 1972 and 866 of 1973

Assistant Collector of Central Excise

APPELLANT

Vs

Khemchand Raj Kumar

RESPONDENT

Date of Decision : 17-01-1977

Acts Referred:

Central Excise Rules, 1944 — Rule 10, 10A, 47, 52, 52A
Central Excises and Salt Act, 1944 — Section 10, 40(2)
Constitution of India, 1950 — Article 226
Tariff Act, 1934 — Section 2A

Citation : (1977) 1 ILR (Cal) 257

Hon'ble Judges : Sabyasachi Mukharji, J; M.M. Dutt, J

Bench : Division Bench

Advocate : Surathi Mohan Sanyal, for the Appellant; R.N. Bajoria, Dilip Kumar Dhar, P.L. Khaitan and M.P. Chowdhury, for the Respondent

Final Decision : Dismissed

Judgement

M.M. Dutt, J.—These two appeals arise from the judgment of Chittatosh Mookerjee J., One appeal has been preferred by the Customs authorities and the other by Khemchand Raj Kumar, a partnership firm, hereinafter referred to as the firm, under the circumstances stated hereafter.

2. The firm imported uncoated cold rolled sheets between 1964 and 1965. It is not disputed that all such imports were made before February 28, 1965. The firm manufactured tinned sheets from the uncoated sheets imported by it. The firm had to pay countervailing customs duty at the rate of Rs. 110 per metric tonne which was then in force. By a notification No. 50/65 dated March 6, 1965, of the Ministry of Finance, the import duty on cold rolled sheets were enhanced to Rs. 225 per metric tonne. Under item No. 26AA of the First Schedule to the Central Excises and Salt Act, 1944, tinned sheets are liable to pay excise duty By a notification No. 24/65 dated February 28, 1965, issued under Rule 8(1) of the Central Excise Rules, 1944, the Central Government fixed the excise duty on tinned sheets or the equivalent customs duty u/s 2A of the Indian Tariff Act,

1934, at Rs. 225 per metric tonne. This notification was subsequently amended by the notification No. 72/65 dated May 1, 1965, which granted certain concession in the payment of excise duty, i.e., at the rate of Rs. 150 per metric tonne, if the duty of excise leviable under item No. 26AA of the First Schedule to the Central Excises and Sale Act, 1944, read with the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 32/65, Central Excise, dated February 28, 1965, or the countervailing duty of customs leviable u/s 2A of the India Tariff Act, 1934, on the uncoated cold rolled sheets used in the manufacture of the tinned Sheets, has already been paid. The said notification No. 72/65 was given retrospective operation with effect from March 6, 1965.

3. On October 13, 1965, the Inspector, Central Excise, issued; a notice u/s 10 of the Central Excise Rules, 1944, to the firm, demanding payment of Rs. 2,93,773-49 which was subsequently reduced to Rs. 2,93,234-26 towards Central Excise Duty. It was stated in the said notice that as the firm did not fulfil the conditions of the notification No. 24/65 dated February 28, 1965, as amended by the notification No. 72/65 dated May 1, 1965, it was to pay excise duty at the tariff rate on the tinned sheets manufactured and removed by it. By another notice dated November 27, 1965, issued by the Assistant Collector of Central Excise, the firm was called upon to show cause why differential duty between the tariff rate of Rs. 375 per metric tonne and the duty already paid on tinned sheets, should not be recovered. It was alleged that the firm had cleared tinned sheets on payment of duty at the rate of Rs. 225 per metric tonne during the month of March 8, 1965, to April 28, 1965 and at the rate of Rs. 150 per metric tonne from May 4, 1965, to July 10, 1965, after availing of the exemption under the notification No. 24/65 dated February 28, 1965, as amended by the notification No. 72/65, dated May 1, 1965, without fulfilling the conditions laid down in the said notification. The differential duty that was demanded from the firm was to the tune of Rs. 8,54,445-93.

4. The firm showed cause in respect of both the above demand notices. The Assistant Collector of Central Excise by his orders dated September 5/6, 1966, held that the tinned sheets were assessable at the tariff rate of Rs. 375 per metric tonne and overruled the contentions of the firm that it was entitled to the concessional rate of duty of Rs. 150 per metric tonne, under the notification No. 72/65 and that the demand made by the notice dated November 27, 1965, was barred by Rule 10 of the Central Excise Rules, 1944. The firm, thereafter, moved this Court under Article 226 of the Constitution against the said order of the Assistant Collector of Central Excise praying for the quashing of the said orders and the demand notices and obtained the Rule nisi out of which these two appeals arise. It was contended on behalf of the firm that it had fulfilled the conditions of the notification No. 24/65 as amended by the notification No. 72/65 and as such, they were entitled to the concessional rate of excise duty. It was further contended that so far as the demand for payment of the differential duty of Rs. 8,54,445-93 for the removal of the tinned sheets between March 8, 1965

and July 10, 1965, was concerned, the notice of demand having been issued long after three months of such removal, it was barred under Rule 10 of the Central Excise Rules, 1944. Chittatosh Mookerjee J. held that the firm did; not fulfil the conditions of the said notification No. 24/65 as amended by the notification No. 72/65 and as such, the firm was liable to pay excise duty as claimed. In that view of the matter, he upheld the demand notice dated October 13, 1965, for payment of excise duty of Rs. 2,93,234-26. So far as the other demand for payment of Rs. 8,54,445-93 was concerned, his Lordship took the view that it was barred by Rule 10, overruling the contention of the Customs authorities that Rule 10A applied. Hence, these two appeals, one by the Customs authorities relating to their claim for Rs, 8,54,446-93 and the other by the firm in respect of the demand for payment of Rs. 2,93,234-26.

5. The questions that are involved in these appeals are as to the legality of the demands for payment of excise duty and to the applicability of Rules 10 and 10A of the Central Excise Rules. Mr. Bajoria, learned Advocate appearing on behalf of the Appellant firm, submits that the firm having paid the countervailing customs duty, u/s 2A of the India Tariff Act that was prevailing before February 28, 1965, at the rate of Rs. 110 per metric tonne, it was entitled to the concessional rate of excise duty, that is, Rs. 150 per metric tonne under the notification No. 72/65. In other words, it is contended by him that the firm fulfilled the conditions of the said, notification. Under the said notification, the concessional rate of Rs. 150 per metric tonne will be available to the manufacturer under either of the two circumstances, namely, where excise duty leviable under item No. 26AA of the First Schedule to the Central Excises and Salt Act, 1944, read with the notification of the Government of India in the Ministry of Finance No. 32/65 dated February 28, 1965; or the countervailing customs duty u/s 2A of the Indian Tariff Act, 1934, has already been paid. It has been already stated that the counter-ailing customs duty at the time of importation by the firm of the cold rolled sheets was only Rs. 110 per metric tonne, but it was increased to Rs. 225 per metric tonne after February 28, 1965, to be precise, on and from March 6, 1965. The rate of excise duty on tinned sheets was Rs. 225 per metric tonne after February 28, 1965. It is, therefore, clear that the countervailing customs duty payable on rolled sheets was placed on par with the excise duty on tinned sheets. It is however, contended on behalf of the Appellant firm, that as the enhanced rate of countervailing duty of Rs. 225 per, metric tonne was not in existence at the time of importation of rolled sheets by the Appellant firm for the manufacture of tinned sheets, it was impossible for the Appellant firm to pay such duty at the said rate and that, accordingly, payment of the countervailing duty at the prevalent rate was sufficient for claiming the concessional rate of duty under the notification No. 72/65. Our attention has been drawn to the previous notification No. 24/65 which used the expression "equivalent customs duty" which is absent in the notification No. 72/65 and it is argued that by the omission of the word "equivalent" it was intended that a manufacturer who paid the countervailing customs duty on rolled sheets at the prevailing rate at the

time of importation was entitled to the concessional rate of Rs. 150 per metric tonne. We are unable to accept the contentions of the Appellant firm. The notification No. 72/65 was made retrospective with effect from March 6, 1965, from which date the customs duty on cold rolled sheets was enhanced from Rs. 110 per metric tonne to Rs. 225 per metric tonne. It is true that a manufacturer cannot pay excise duty on tinned sheets at the time of importation of cold rolled sheets and he could only pay the countervailing customs duty. But in order to avail of the concessional rate he has to pay the countervailing customs duty which is equivalent to the excise duty on tinned sheets and as the rate of customs duty on cold rolled sheets and excise duty on tinned sheets became the same from March 6, 1965, the notification No. 72/65 would, in our view, apply only in those cases where the importation of cold rolled sheets were made on or after the March 6, 1965. In the notification No. 72/65 nothing has been said why the same was given retrospective operation from March 6, 1965, but in the context of the fact that both the excise duty and the customs duty payable respectively on tinned sheets and cold rolled sheets became the same on and from March 6, 1965, the notification was given retrospective effect from that date. That is also the reason why the word "equivalent" was dropped in the notification No. 72/65. In these circumstances, we are of the view that the Appellant firm was not entitled to claim concessional rate of duty, i.e., Rs. 150 per metric tonne on tinned sheets removed from its warehouse.

6. The next question is whether the demand of the Customs authorities for Rs. 8,54,445-93 is barred by Rule 10 of the Central Excise Rules. We may now refer to Rules 10 and 10A which are as follows:

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 any 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 pay 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 owner's account-current, if any, or from the date of making the refund.

10-A. Residuary powers for recovery of sums due to Government.--Where these Rules do not make any specific provision for the collector 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.

Rule 52 of the Central Excise Rules provides as follows:

52. When the manufacturer desires to remove goods on payment of duty, either from the place or a premises specified under Rule -9 or from a store-room or other place of storage approved by the Collector under Rule 47, he shall make application in triplicate (unless otherwise by rule or order required) to the proper officer in the proper form and shall deliver it to the officer at least twelve hours (or such other period as may be elsewhere prescribed or as the Collector may in any particular case require or allow) before it is intended to remove the goods. The officer, shall, thereupon, assess the amount of duty due on the goods and on production of evidence that this sum has been paid into the Treasury or paid to the account of the Collector in the Reserve Bank of India or the State Bank of India, or has been despatched to the Treasury by money-order shall allow the goods to be cleared.

7. The Appellant firm cleared the tinned sheets manufactured by it from cold rolled sheets covered by the demand notice dated November 27, 1965, for the sum of Rs. 8,54,445-93 after making applications in the proper forms, namely ARI Forms, to the Inspector, Central Excise, on duty at the gate of the Appellant's factory and on payment of concessional rate of duty. The Appellant firm also obtained gate passes from the said officer under Rule 52A for the removal of the tinned sheets. As the Appellant firm was not entitled to the concessional rate of excise duty, the duty was obviously short levied. Rule 10 will apply to the cases of short-levy of duties or charges when such short-levy was due to the inadvertence, error, collusion or misconstruction on the part of the officer or when it was due to the mis-statement as to the quantity or description or value of the goods on the part of the owner and in the case of refund of duty when it was erroneously refunded owing to any of such causes. Rule 10 prescribes a period of limitation of three months from the date on which the duty or charge was paid or adjusted Or from the date of making the refund. In the instant case, the short-levy was undoubtedly through the inadvertence or error of the officer concerned. In the ARI Forms, the Appellant firm mentioned the notifications Nos. 24/65 and 72/65 and claimed the concessional rate of duty which was allowed. Therefore, there can be no doubt that Rule 10 applied and the demand not having been made within three months from the date of short-levy of duty, it was barred.

8. It is, however, contended by Mr. Surathi Mohan Sanyal, the learned Advocate appearing on behalf of the Customs authorities that there was mis-statement by the Appellant firm in the ARI Forms, namely, that the firm was entitled to the concessional rate of duty under the notification No. 72/65 and that such mis-statement not being, one of the kinds mentioned in Rule 10, the residuary Rule 10A would apply which unlike Rule 10, prescribes no period of limitation. We are unable to accept this contention. We do not think that as the Appellant firm claimed the benefit of the notification No. 72/65 they can be said to have made a mis-statement. It is apparent from the notification No. 24/65 and notification No. 72/65 that there were some confusion as to the rate of countervailing customs duty. Prima facie one might think that the payment of countervailing duty which

was prevalent before February 28, 1965, at the time of importation of cold rolled sheets by the Appellant firm was also contemplated by the notification No. 72/65. The claim for exemption from payment of the full amount of duty as made by the Appellant firm in the ARI Forms seems to have been made bona fide. The officer concerned also committed an error in thinking that the Appellant firm was entitled to such exemption as it had paid countervailing customs duty at the time of importation. In these circumstances, while we hold that no mis-statement was made by the Appellant firm in the ARI Forms, the officer concerned through error or inadvertence short-levied the duty from the Appellant firm. In the context of what has been stated above Rule 10 was applicable and not Rule 10A and as the demand was made beyond the period of limitation prescribed by Rule 10, it was barred.

9. Mr. Bajoria has taken before us two new points in opposing the appeal preferred by the Customs authorities. It is contended that by the notice of demand dated October 13, 1966, a legal proceeding was instituted within the meaning of Sub-section (2) of Section 40 of the Central Excises and Salt Act, 1944 and as the legal proceeding had been instituted after the expiration of six months from the accrual of cause of action, it was barred by Sub-section (2). We are unable to accept this contention. In our view, by the issuance of the notice of demand no legal proceeding could be said to have been instituted by the Respondent and so there is no scope for the application of Sub-section (2) of Section 40. The view which we take finds support from a Bench Decision of this Court in *Assistant Collector of Customs v. Shiva Glass Works Ltd.* (1976) 80 C.W.N. 1057.

10. Next, it is contended that Rule 10A is ultra vires the Central Excises and Salt Act, 1944. We do not, however, think it necessary to decide this point, for we have held that Rule 10 and not Rule 10A applied to the notice of demand dated November 27, 1965. No other point has been argued in these appeals.

11. In the result, both these appeals are dismissed, but in view of the facts and circumstances of the case, there will be no order as to costs in either of them.

Sabyasachi Mukharji J.

12. I agree.