

(1983) 02 CAL CK 0023
In the Calcutta High Court
Case No : Civil Rule No. 12 (W) of 1981

Associated Pigments Limited

APPELLANT

Vs

Collector of Central Excise and Others

RESPONDENT

Date of Decision : 03-02-1983

Acts Referred:

Central Excise Rules, 1944 — Rule 11, 8(1)
Central Excises and Salt Act, 1944 — Section 11B, 11B(1), 35
Constitution of India, 1950 — Article 226

Citation : (1986) 9 ECC 18 : (1983) 13 ELT 876

Hon'ble Judges : Chittatosh Mookerjee, J

Bench : Single Bench

Advocate : P.P. Ginwalla, N.L. Banerjee and Subhash Ch. Basu, for the Appellant; D.N. Das, B.P. Banerjee, Tapan Pal, R.N. Das, Sardar Amjad Ali and Archana Sen Gupta, for the Respondent

Judgement

Chittatosh Mookerjee, J.—In this three Rules the main question is whether or not the petitioner company, was entitled to claim exemption from payment of excise duty in respect of lead suboxide and lead monoxide manufactured in its factory in terms of the Notification No. 119/75-C.E., dated 30th April, 1975 issued by the Government of India in exercise of the powers conferred by Rule 8(1) of the Central Excise Rules, 1944.

2. The Finance Act, 1975 had inserted in the First Schedule of the Central Excises and Salt Act, 1944, now Tariff Item No. 68 under which "all other goods not elsewhere specified manufactured in a factory" became subject to duty at the specified rate. In the exercise of the powers conferred by Sub-rule (1) of Rule 8 of the Central Excise Rules, 1944, the Central Government by the aforesaid Notification No. 119/75-C.E., dated 30th April, 1975 had "exempt goods falling under Item No. 68 of the First Schedule to the Central Excises and Salt Act, 1944 (I of 1944) manufactured in a factory as a job work from so much of the duty of excise leviable thereon as is in excess of the duty calculated on the basis of the amount charged for the job work. During the material period, the petitioner used

to receive pig lead or lead ingots from its customers for conversion into lead suboxide and lead monoxide. After subjecting the said lead to the process, mentioned in paragraph 3 of the writ petition filed in C.R. No. 12 (w) of 1981, the petitioner returned the finished products to its customers and charged the agreed price for the said process. The petitioner itself did not supply any material for manufacture of lead sub-oxide and lead monoxide (lithergo) and the petitioner has claimed that in undertaking the aforesaid manufacturing process it performed job work and it was entitled to exemption in terms of the Notification No. 119/75-C.E., dated 30th April, 1975.

3. The respondents have disputed the petitioner's claim for such exemption on the ground that pure lead supplied by the petitioner's customers after undergoing manufacturing process became entirely new articles or goods, namely, lead suboxide, and lead monoxide, whose character, use and name in trade parlance were different from pure lead supplied by the petitioner's customers. Only in case the article which is supplied by the customer after some manufacturing process is returned, exemption from the payment of duty could be claimed under the said Notification. In case, not, the same article supplied by the customers but an entirely new article is returned, the person who undertakes manufacturing process cannot claim exemption in terms of the Notification No. 119/75-C.E., dated 30th April, 1975. In other words, in terms of the said Notification goods falling under Item No. 68 of the First Schedule of the Act 1 of 1944 qualify for exemption only in case articles supplied to the job worker even after undergoing manufacturing process continued to be the same articles or goods.

4. I am unable to accept the interpretation put by the respondents upon the scope and effect of the said Notification No. 119/75-C.E., dated 30th April, 1975. In the first place, the said Notification exempted goods falling under Item No. 68 of the First Schedule to the Central Excises and Salt Act, 1944 manufactured in a factory as a job work from so much of the duty of excise leviable thereon as is in excess of the duty calculated on the basis of the amount charged for the job work. It is settled law that the test for determining whether a particular process through which a commodity passes amounts to manufacture is to ascertain whether such "proceeding of the original commodity brings into existence a commercially different or distinct commodity" (vide *Chowgule and Co. Pvt. Ltd. and Another Vs. Union of India (UOI) and Others*,). Article manufactured means to bring into existence a new substance and does not mean merely to produce some change in the substance (vide *Union of India (UOI) Vs. Delhi Cloth and General Mills*,). Thus when, an article undergoes a manufacturing process, a new or different article emerges. The notification and the explanation thereunder referred to manufacturing processes undertaken as job works. Therefore, the respondents cannot be heard to say that the exemption under the aforesaid Notification is confined to those manufacturing processes undertaken by a job worker which do not result in the change of identity of the article handed over by the customer for job work. If, in spite of the process undertaken by the job

worker, the article does not undergo any change in its character or use, it would not be possible to say that the process in question is a manufacturing process. Only those processes which result in making a new or a distinct article could be termed as manufacturing process. Therefore, the use of expression "that article" in the explanation to the aforesaid Notification No. 119/75-C.E. dated 30th April, 1975 does not contemplate that after job work the same or the identical goods is to be returned in order to qualify for exemption under the said Notification,

5. G.N. Ray, J in 1980 Excise Law Times had occasion to consider the scope and effect of the aforesaid Notification No. 119/75-C E dated 30th April, 1975. The Division Bench consisting of M.M. Dutt and Sharma JJ in Collector of Central Excise and Anr. v. Madura coats Ltd. Serampore 1980 E.L.T. 129, dismissed the appeal preferred by the Collector of Central Excise and affirmed the decision Of G.N. Ray, J. in Madura Coats Ltd. v. Collector of Central Excise 1980 E.L.T. 582. In the said reported case the petitioner company used to arrange in a particular manner nylon or rayon yarns supplied by its customers. The said arrangement was known as tyre chord warpsheet. According to the Excise Authorities, the said proceeding of nylon or rayon yarns amounted to manufacture and a new commodity or goods were produced; which would be subject to levy of excise duty under Entry No 68 of the First Schedule of the Central Excises and Salt Act, 1944. Both the learned trial Judge and the Division Bench in appeal held that as a result of such combination there was no transformation and, therefore, no new and different article or goods were thereby manufactured. Accordingly, the said warpsheets were not subject to excise under Entry No. 68. Alternatively it was held that even if tyre chord warps were new commodities, the petitioner manufactured the same as job work and therefore the petitioner was entitled to the benefits of the Notification No. 119/75-C.E., dated 30th April, 1975. G.N. Ray J at page 592 of the report held that the petitioner of the said case fulfilled the criteria under the explanation to the said Notification in spite of the fact that the petitioner supplied cotton wefts to hold the nylon or rayon yarns supplied by the customers for performing the job work in question The Division Bench in appeal at page 132 of the reports discussed the alternative contention that even assuming that nylon or rayon warpsheets were within Entry No. 68 of the First Schedule of the Central Excises and Salt Act, 1944, the respondent company would be entitled to exemption of excise duty as it performed the job work in accordance with the said Notification dated 30th April, 1975. The Division Bench held that a work does not cease to be a job work simply because the job worker supplies some additional articles which does not constitute a substantial part of the manufacturing process. Thus, the Division Bench in Madura Coats Ltd."s case (supra), in substance found that even when a new commodity is manufactured as job work, the same would qualify for exemption under the aforesaid Notification No. 119/75-C.E., dated 30th April, 1975.

6. The decision of a Division Bench of the Gujarat High Court in Anup Engineering Co v. Union of India 1978 LT 533, also supports the view taken by me regarding the scope and effect of the said Notification No. 119/75-C.E., dated 30th April,

1975. The Division Bench in paragraph ? of their judgment had pointed out that the expression "job work" in the said Notification means such items of work where the article intended to undergo manufacturing process is supplied to the job worker and that the article is returned by the job worker to the supplier after the article has undergone the intended manufacturing process charging only for the job work done by him. According to the learned Judges, it was obvious in the context of the excise law that unless a new article known to trade emerges after the manufacturing process is completed, excise cannot be levied at all. A job worker is exempted from payment of the excise duty when the article which undergoes manufacturing process is supplied by the customer and the only thing which a job worker has to do is to subject the article supplied by the customer to the intended manufacturing process. The Division Bench in *Anup Engineering Co. v. Union of India* (supra), had also pointed out that the Deputy Collector Central Excise, Bombay by a trade notice had clarified, inter-alia that the exemption under the aforesaid Notification No. 119/75 C.E. dated 30th April 1975 would be applicable irrespective of the trade nomenclature of the article at the time of the receipt and at the time of the despatch after subjecting it to a manufacturing process. I respectfully agree with the view taken by the Division Bench of the Gujarat High Court in *Anup Engineering Co. v. Union of India* (supra), and the said decision is also in accord with the view taken by this Court in *Madura Coats Ltd. v. The Collector, Central Excise* (supra). I accordingly conclude that the petitioner company was entitled to exemption from payment of excise duty in respect of lead suboxide and lead monoxide processed by the petitioner from pure lead or lead ingots supplied by its customers. The respondents had acted illegally by levying excise duty in respect of the said products processed by the petitioner as job work.

7. The petitioner has stated that between 3rd May, 1975 and 28th June, 1975 it had cleared the goods in question upon payment of excise duty on the alleged total value thereto as provisionally assessed. Thereafter the Assistant Collector had refunded Rs. 5699.22 P. by issuing a cheque for a part of the amount and by adjusting the balance amount against a fine and penalty imposed upon the petitioner. Thereafter the Assistant Collector of Central Excise by his order dated 1st December, 1977 held that the petitioner was not entitled to the said refund and again made a demand for Rs. 5699.22 P. The petitioner, being aggrieved, had preferred an appeal to the Appellate Collector of Central Excise, who had dismissed the same. Thereupon, the petitioner obtained C.R. No. 11735(w) of 1980 and obtained interim orders. In view of the foregoing findings, this Rule ought to be made absolute and the said demand including the appellate order ought to be quashed.

8. The Assistant Collector of Central Excise after issuing a show-cause by his order dated 14th August, 1978 had confirmed the demand for payment of differential duty of Rs. 1901759 P. The Assistant Collector held that the petitioner was not entitled to exemption from payment of full duty under Item No. 68 of the First Schedule of the Central Excises and Salt Act, 1944 in respect of the

processing of pure lead into suboxide and lead monoxide. The Appellate Collector of Central Excise had dismissed the petitioner's appeal preferred u/s 35 of the Central Excises and Salt Act, 1944.

9. The petitioner in paragraph 16 of the Writ Petition filed in C.R. No. 12(w) of 1981 has stated that since August, 1977 up to October, 1980 it had allegedly paid under protest Rs. 1290292.84 P. in excess of the duty payable by the petitioner as per Notification No. 119/75-C.E., dated 30th April, 1975. Particulars of the said payments have been also set out in Annexure "G" to the Writ Petition. The petitioner has prayed in C.R. No. 12 (w) of 1981 that the respondents be commanded to refund the same sum of Rs. 1290292.84 P. paid by the petitioner under protest.

10. The respondents in their affidavit-in-opposition disputed the petitioner's right to claim exemption for manufacturing process undertaken by it on the ground that lead suboxide and lead monoxide were different articles from metallic lead handed over by the petitioner's customers. But the respondents in their affidavit-in-opposition did not traverse the petitioner's assertion in paragraph 16 of the writ petition in C.R. No. 12(w) of 1981 that during the aforesaid period the petitioner under protest had paid Rs. 1290292.84 P. in excess of the duty legally payable by the petitioner. Mr. Jinwalla, learned advocate for the petitioner, has submitted that the said levy of full excise duty upon the lead processed by the petitioner as job work being illegal and contrary to the aforesaid Notification No. 119/75-C.E., dated 30th April, 1975, the respondents ought to be commanded to refund the said excise duty paid by the petitioner,

11. Section 11B of the Central Excises and Salt Act, 1944 was inserted with effect from 17th November, 1980. Sub-section (1) of Section 11B provides that any person claiming refund of any duty of excise may make an application for refund of such duty to the Assistant Collector of Central Excise before the expiry of six months from the relevant date provided that the limitation of six months shall not apply where any duty has been paid under protest. Rule 11 of the Central Excises and Salt Act, 1944 which was omitted with effect from 17th November, 1980 contained similar provision for refund of excess excise duty paid. The learned advocate for the respondents has not disputed that when levy of a tax or duty is found to be illegal, exercising writ jurisdiction the court has discretionary power to direct refund of illegal tax or duty paid. Thereafter, I am not impressed with the further submission on behalf of the respondent that this court need not issue a mandate for refunding the duty paid by the petitioner in breach of exemption under the said notification. In my view, this is a proper case where the respondents ought to be directed to refund excise duties paid under protest. It would be a travesty of justice to relegate the petitioner to fresh proceeding for obtaining refund of amounts which have been illegally recovered from the petitioner in disregard of the exemption granted by the aforesaid Notification No. 119/75-C.E., dated 30th April, 1975. The facts of the present case fully satisfied the test laid down by the Supreme Court in State of Madhya

Pradesh Vs. Bhailal Bhai and Others, , and therefore, discretion ought to be exercised to direct the respondents to refund to the petitioner excise duties levied in disregard of the aforesaid Notification No. 119/75 C.E., dated 30th April, 1975.

12. Mr. Das, learned advocate for the respondents, submitted that without exhausting the remedy provided under the Central Excises and Salt Act, 1944 the petitioner has filed these writ applications and therefore the Rules ought to be discharged. Mr. Das has also submitted that the petitioner has not explained the delay in moving this court under Article 226 of the Constitution.

13. At an earlier stage the respondents had refunded a certain amount of excise duty paid by the petitioner but thereafter the respondents changed their views about the petitioner's right to get exemption under the aforesaid Notification dated 30th April, 1975 and begin to demand duty under Item No. 68, Schedule 1 of the Central Excises and Salt Act, 1944 upon lead sub-oxide and lead monoxide manufactured by the petitioner. The petitioner has claimed that throughout it had been paying excise duty under protest pending disposal of its appeal. Therefore, in fact there was no question of any delay on the part of the petitioner. In the circumstances of the case, it would have been futile for the petitioner to prefer a Revision Application against the appellate order of the Appellate Collector of Central Excise before filing these Writ Applications. The learned Judges who issued these Rules have already exercised their discretion to entertain those writ petitions. Therefore, after the petitioner has established its case on merits, I cannot throw out the writ application on the above preliminary grounds.

14. I accordingly make these Rules absolute. Let Writs of Mandamus issue commanding the respondents not to levy excise duty upon the goods mentioned in the petition which were processed by the petitioner as job work, and I further command the respondents to grant the petitioner benefits of the Notification No. 119/75-C.E., dated 30th April, 1975 during the period the said Notification had remained in force. Let Writs of Certiorari issue quashing assessment, levy and demand of excise duty and appellate orders made by the respondent in respect to the aforesaid articles supplied by the petitioner's customers and were returned by the petitioner after undertaking manufacturing process as job worker. Let Writs of Mandamus issue commanding the respondents to refund to the petitioner of excise duties paid by the petitioner under protest in respect of the aforesaid goods. For this purpose within two months from this day the petitioner would produce before the respondent No. 1 necessary papers, receipts and gate passes to establish the actual amounts of excise duty paid. The appropriate authority within four months thereof would complete verification and issue necessary refund order in favour of the petitioner. There will be no order as to costs.

15. The bank guarantee furnished by the petitioner be discharged now.