(1993) 06 CAL CK 0011

In the Calcutta High Court

Case No : Matter No. 2251 of 1991

Associated Pigments Ltd. APPELLANT

Vs

Superintendent of Central Excise RESPONDENT

Date of Decision : 21-06-1993

Acts Referred:
Central Excises and Salt Act, 1944 — Section 11A, 11A(3)

Citation : (1993) 68 ELT 514

Hon'ble Judges : Ruma Pal, J

Bench : Single Bench

Advocate : S.K. Bagaria and Partha Banerjee, for the Appellant;Prantosh Mukherjee, for the Respondent

Final Decision : Allowed

Judgement

Ruma Pal, J.—The petitioner company manufactures Lead Oxide Grey. The dispute in this case is whether Lead Oxide is classifiable under sub-heading No. 2804.60 as per the Central Excise Tariff Act, 1985 as Lead Oxide, Red Lead and Orange Lead or whether it is classifiable under sub-heading No. 3823.00 as follows :-

"Prepared binders for foundry moulds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included; residual products of the chemical or allied industries, not elsewhere specified or included.".

2. With effect from 28th February, 1986 Tariff Items under sub-heading No. 2804.60 were introduced as separate items which read as follows :-

"Lead Oxide, Read Lead and Orange Lead -10%"

3. Subsequent to such introduction the petitioners paid Excise duty on the products manufactured by it under protest on the basis that the products

manufactured by it were classifiable under sub-heading No. 2804.60 and not under the residual item of Tariff.

4. On 19th March, 1986 the Excise authorities drew samples from the petitioners'' product Lead Oxide Grey. The Chemical Examiner submitted a report to the effect that it was Lead Oxide (Lead Sub-Oxide). The petitioners thereafter wrote letters to the Ministry of Finance as well as to the Central Board of Excise and Customs contending that Lead Oxide Grey was classifiable only under sub-heading No. 2804.60. The Ministry of Finance wrote to the petitioners stating that necessary instruction had been issued to the Collector of Central Excise with regard to classification of the product. A trade notice was thereafter issued on 5-6-1986 to the effect inter alia that Lead Oxide Grey, which is Lead Sub-Oxide, falls for classification under sub-heading No. 2804.60. Because the petitioners had been paying excise duty under protest in respect of the product as claimed by the Excise authority, they filed an application for refund of Rs. 31,786/- being the difference between the excise duty claimed and the excise duty in fact payable on the product. The petitioners'' claim was allowed and refund was made.

5. On 10th February, 1987 the Tariff Item number was changed. The old sub-heading No. 2804.60 was renumbered as sub-heading No. 2824.00. The Tariff item''s description however continued to be identical. The petitioners filed a classification list on 2nd March, 1987 claiming classification of Lead Oxide Grey under sub-heading No. 2824.00. This was approved by the Assistant Collector. The petitioners then filed a second classification list effective from 1-3-1988 similarly claiming classification of Lead Oxide Grey under subheading No. 2824.00. During the pendency of the approval of the Classification List for the period effective from 1-3-1988, a notice to show cause was issued by the Collector in respect of the previous period, namely, from 1-3-1986 to 30-6-1987 on the allegation that lead oxide grey was not covered by the Tariff Sub-heading 2824.00 but was classifiable under the residuary item. A few months after the issuance of this Show Cause Notice by the Collector for the period from 1-3-1986 to 30-6-1987, two notices to show cause were issued by the Assistant Collector. The first Show-cause Notice was dated 17-3-1989 and related to the approval of the Classification List effective from 1-3-1988. The second Show-cause Notice, issued by the Assistant Collector, was dated 2-5-1989 by which proceedings were sought to be initiated for claiming the difference of duty arising from classification of lead oxide grey under Tariff sub-heading 2824.00 and Tariff sub-heading 3823.00 for the period from July, 1987 to February, 1988. The Show Cause Notice dated 2-5-1989 has been impugned in this proceeding.

6. Subsequent to the issuance of the impugned notice the Collector of Central Excise disposed of the Show Cause Notice dated 6-1-1989 relating to the period from 1-3-1986 to 30-6-1987. He held that lead oxide grey was classifiable under sub-heading 2804.60 (Later on re-numbered as 2824.00) for the period in question. The Assistant Collector accordingly approved the Classification List for the period effective from 1-3-1988 on the basis of the Collector''s order that lead

oxide grey was classifiable under sub-heading 2824.00. This approval was made on 29-7-1990.

7. It appears that by reason of certain audit objections that lead oxide grey is not classifiable under the Tariff Head, ''Lead Oxide'', the Board referred the matter to the Chief Chemist, Central Revenue Chemical Laboratory, New Delhi. The Chief Chemist submitted a report on 16-8-1990 giving chemical components of lead oxide grey and stating that it was classifiable under Tariff Heading 3823.00 and not under 2824.00. The Board agreed with the view of the Chief Chemist and issued a clarification on 14-9-1990 to the effect that lead oxide grey was appropriately classifiable under sub-heading 3823.00 of the Tariff and not as lead oxide falling under 2824.00. On the basis of the Board''s instructions the Additional Collector, Central Excise, issued a Trade Notice dated 16-10-1990 to the following effect :-

"Doubt has been expressed whether Oxides of Lead viz. Lead Oxides Red, Lead Oxides Yellow and Lead Oxides Grey are appropriately classifiable under sub-heading 2804.60.

It is clarified that the appropriate classification of the product ''Lead Oxide Grey'' would be under sub-heading 3823.00 and not in sub-heading 2804.60."

On 25-2-1991 the Assistant Collector purported to dispose of the proceedings initiated on the basis of the impugned Notice dated 2-5-1989 as well as the Show Cause Notice dated 17-3-1989. This order has also been impugned in this proceeding. In the order dated 25-2-1991 the Assistant Collector has relied upon the report of the Chief Chemist, Central Revenue Chemical Laboratory (C.R.C.L.) and has quoted the opinion of the Chief Chemist in extenso. On such basis he held as follows :-

"In view of whatever has been stated hereinbefore, I pass the following orders. I hereby classify lead oxide grey (lead sub-oxide) manufactured by the said party, i.e., M/s. Associated Pigments Ltd., under sub-heading No. 3823.00 of schedule to the Central Excise Tariff Act, 1985 chargeable to basic excise duty @ 15% ad valorem and accordingly, the show cause notice C. No. CE-13/1/R-VI / Kdh /89/153 dt. 17-3-1989 is disposed of.

I also confirm the demand of differential duty of Rs. 13,20,953.28p. u/s 11A of the Central Excises and Salt Act, 1944, against the said party M/s. Associated Pigments Ltd. Accordingly show cause notice No. GL-3(a)11/R-VI/Kdh/88/202 dated 2-5-1989 is disposed of.

I also order M/s. Associated Pigments Ltd. to pay the aforesaid duty so confirmed within 10 (ten) days of receipt of this order."

8. The writ petitioner then moved this writ petition on 29-5-1991 challenging the proceedings relating to the levy and demand of Central Excise Duty on the lead oxide grey on the basis that it was classifiable under subheading No. 2824.00 and specifically challenging the order dated 25-2-1991. An interim order was

passed to a limited extent to the effect that the petitioner would continue to pay the Duty on lead oxide grey as if it were classifiable under sub-heading 2823 without prejudice and upon an undertaking of the Excise Authorities to refund the difference, if the petitioners succeeded in the writ petition. It was also made clear that in the event any future demand was made in respect of the period subsequent to February, 1989 upto 1-6-1991, the petitioners will be at liberty to challenge the same in this proceeding by way of an application or affidavit, if so advised.

9. Directions were also given for filing of affidavits. The respondents have filed an affidavit-in-opposition in this proceeding, although the original is not traceable.

10. The petitioners have raised various contentions in this writ petition. The Court is not deciding all the contentions raised but is disposing of the writ petition on the ground of limitation.

11. The period of limitation has been prescribed u/s 11A of the Central Excises and Salt Act, 1944 (hereinafter referred to as "the said Act"). Section 11A of the said Act provides for a Show Cause Notice to be issued within 6 months from the relevant date when show cause is for the levy of Duty which has not been paid or has been short levied or short paid or erroneously refunded. The relevant date has been defined in Section 11A(3)(ii) of the said Act. It is not in dispute in this case that the Show Cause Notice was, in fact, issued beyond the period of 6 months from the relevant date in this case. In that view of the matter, the proceedings are ex facie barred by limitation. It is true that the proviso to Section 11A of the said Act provides that this period of 6 months may be extended upto 5 years, provided there was any fraud or collusion or any wilful mis-statement or suppression of facts or contravention of any of the provisions of the Act or of the rules made thereunder with intent to evade payment of Duty by the assessee. In the impugned Show Cause Notice there is no allegation whatsoever of any of these ingredients justifying extension of the period of 6 months provided in normal cases.

12. There is another aspect of the matter. When action is taken on the basis of fraud, collusion, etc. under the proviso to Section 11A of the said Act the action is required to be initiated by the Collector of Central Excise. The impugned notice having been issued by the Assistant Collector beyond the period of 6 months, cannot, therefore, be sustained.

13. The petitioners have referred to several decisions in this regard all of which support their contentions. Some of those decisions are,

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

(b) ''Indian Cardboard Industries Limited, v. Collector of Central Excise'' reported in 1992 (59) E.L.T. 508.

(c) ''Birla Jute and Industries Ltd. v. Union of India'' reported 1992 (60) E.L.T. 437; and

(d) S.D.B. Chemical Mfg. Co. Pvt. Ltd. Vs. Addl. Collector of C. Ex.,

14. The impugned Show Cause Notice dated 2-5-1989 having been invalidly issued beyond the period of limitation, the order dated 25-2-1991 also cannot be sustained on this ground.

15. Additionally, the order dated 25-2-1991 appears to suffer from further infirmities which are apparent on the face of the records. The first is that despite the approval of the Classification List pursuant to the Show Cause Notice dated 17-3-1989 in respect of the period commencing from 1-3-1988 as far back as on 29-6-1990 by the then Assistant Collector, the Assistant Collector in the impugned order has sought to again dispose of the Show Cause Notice dated 17-3-1989 by holding that the classification was to be made not as approved but under sub-heading 3823.00. It does not appear that the Assistant Collector had any such jurisdiction to subsequent re-approve the Classification List. The other aspect is that in the impugned order the Assistant Collector has relied upon a report, no copy of which was admittedly made over to the petitioners. The impugned order, therefore, is also vitiated by non-compliance of the principles of natural justice. However, I do not rest my decision on the last two grounds and I decide in favour of the petitioners, at least as far as the impugned notice and the order dated 25-2-1991 are concerned, on the basis of limitation alone.

16. During the pendency of the writ application, a second notice to show cause was issued by the Collector, dated 2-4-1993, in respect of the period from 1-3-1988 to 1-3-1991. The petitioner has filed a supplementary affidavit challenging this order. The respondents say that the petitioners could not take advantage of the interim order dated 30-5-1991, passed by this Court, which had given the petitioners an opportunity to challenge the subsequent orders by way of a supplementary affidavit, as the interim order has since expired. In my view, this submission is too technical to be taken into consideration. A copy of the supplementary affidavit has been served upon the respondents. In any event, it is a matter of record and the question is being decided on the basis of the order itself.

17. In this Show Cause Notice dated 2-4-1993, which has been issued by the Collector of Central Excise, an allegation has been made against the petitioner to the following effect :-

"The assessee suppressed the material fact of chemical preparation of the product for the purpose of classification with the intent to evade payment of Central Excise Duty."

18. In my view, this is no allegation of fraud, wilful mis-statement etc. justifying the invocation of proviso to Section 11A. The decisions cited above have specifically held that there must be a positive act on the part of the assessee to justify invocation of the proviso to Section 11A. A mere suppression of fact would not be failure to disclose. Nothing has been alleged by the Collector in the Show Cause Notice except for a verbatim reproduction of the language of a portion of

Section 11A. That would not do. The allegation is also contrary to the record. The petitioner has been paying duty on lead oxide grey since 1986 under protest. The sample of his product has been chemically tested by the Tariff Authority and his case has been considered at length by the Collector in disposing of the Show Cause Notice for the period from 1-3-1986 to 30-6-1987. It may be noted that no appeal has been preferred by the respondents-authorities from the order of the Collector holding that lead oxide grey is classifiable under Tariff Item No. 2824.00 and not under 3823.00. In fact, for the major portion of the period for which the Show Cause Notice dated 2-4-1993 was issued by the Collector was during the period prior to the issuance of the Trade Notice dated 16-10-1990. For that prior period the Board had clarified that the petitioners'' product was, in fact, properly classifiable under sub-heading 2824.00. Therefore, non-payment of Excise duty on the basis that it was classifiable under sub-heading 3823.00 for such prior period could not in any event be said to be with any intention to evade duty. The Trade Notice dated 16-10-1990 itself specifies that there was doubt regarding classification of lead oxide grey. The decisions, referred to earlier have also held that when there is a bona fide doubt, non-payment of Excise duty could not be described as having been made with an intention to evade duty.

19. In that view of the matter, the impugned Show Cause Notice dated 2-5-1989, the order dated 25-2-1991 and the Show Cause Notice dated 2-4-1993 are set aside and quashed. The writ application is accordingly allowed.

20. There will be no order as to costs.

21. All parties concerned are to act on a signed copy of this Dictated Order on the usual undertaking.