

(1985) 04 BOM CK 0019
In the Bombay High Court
Case No : Writ Petition No. 325 of 1981

Atul Products Ltd.

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 11-04-1985

Acts Referred:

Central Excise Rules, 1944 — Rule 11
Central Excises and Salt Act, 1944 — Section 4
Customs Act, 1962 — Section 27, 27(1)

Citation : (1986) 1 BomCR 572 : (1985) 22 ELT 714 : (1986) MhLj 554

Hon'ble Judges : Sujata V. Manohar, J

Bench : Single Bench

Judgement

1. The petitioners carry on business, inter alia, of manufacturing dye-stuffs and dye-intermediates. In the manufacture of dye-stuffs and dye-intermediates one of the raw materials used is a product known as "Naphthalene". The main commercial source of supply of Naphthalene is coal-tar. According to the petitioners although it is technically possible to obtain Naphthalene from petroleum products 90% of the supply of Naphthalene comes from coal-tar. The petitioners under invoice dated 23rd December, 1977 imported 500 metric tonnes of Naphthalene from German manufacturers. The said goods arrived from Germany. Thereafter the petitioners filed their bill of entry dated 13th February 1978. The petitioners had produced three certificates dated 14-11-1977, 18-1-1978 and 23-1-1978 from their German suppliers to the effect that Naphthalene which was supplied by them and which was imported by the petitioners was exclusively produced from crude coal-tar. The certificates also stated that there was no production of petroleum Naphthalene in the Federal Republic of Germany. All the three certificates are to the same effect.

2. The petitioners were assessed to Customs duty in respect of the Naphthalene so imported under Customs Tariff Item 27.07 which item refers to oils and other products of the distillation of "high temperature coal-tar". For the purpose of countervailing duty, however, the petitioners were assessed under Tariff Item 11A

of the First Schedule to the Central Excises and Salt Act, 1944. Item 11A of the First Schedule to the Central Excises and Salt Act (hereinafter referred to as Central Excise Tariff) is as follows :

Item No.	Description of Goods	Basic Rate of Duty	Additional Duty
11A	PETROLEUM PRODUCTS NOT OTHERWISE SPECIFIED	(Rs. per kilolitre at 15 degree C)	
11-A.	All products derived from refining of crude petroleum or shale (whether gaseous, liquid, semi-solid or solid in form), not otherwise specified, including refiners, gases, lubricating oil and greases, waxes and coke		

Item 11A deals with petroleum products not otherwise specified. According to the petitioners Naphthalene imported by them cannot be classified as a petroleum product. It is a product derived from coal-tar. It is, therefore, classifiable under residuary Item 68 of the Central Excise Tariff. Under Notification bearing No. 364-Cus., dated 2-8-1976 goods falling under Item No. 68 of the First Schedule to the Central Excises and Salt Act, 1944, when imported into India are exempt from the whole of the additional duty leviable thereon u/s 3 of the Customs Tariff Act, 1975. Hence the petitioners contend that Naphthalene imported by them which falls under Tariff Item 68 of the First Schedule to the Central Excises and Salt Act, 1944 is exempt from countervailing duty levied u/s 3 of the Customs Tariff Act, 1975.

3. The petitioners were however, assessed to countervailing duty under Item 11A of the Central Excise Tariff. Thereafter the petitioners made an application dated 23rd January, 1979 to the Assistant Collector of Customs for refund of countervailing duty wrongly levied by classifying Naphthalene under Central Excise Tariff Item 11A. The amount of refund thus claimed on 500 metric tonnes of Naphthalene came to Rs. 7,46,550.24.

4. It seems that in the meanwhile one Atic Industries Limited which is a sister concern of the petitioners imported 30,000 kgs. of Naphthalane. Countervailing duty had been levied on Naphthalene so imported under Item 11A of the Central Excise Tariff. Atic Industries Limited disputed this assessment and claimed a refund of countervailing duty, inter alia, on the ground that it should have been assessed under Item 68 of the Central Excise Tariff. This contention of Atic Industries was accepted in appeal by the Collector of Customs under an order dated 30th November, 1978. In his Order the Collector of Customs has held that there is overwhelming evidence produced by the appellants to show that the goods imported are the product of distillation of coal-tar and that there is no evidence that the goods imported are derivatives of petroleum. It is, therefore, correctly classifiable under Item 68 of the Central Excise Tariff. The Collector also ordered consequential refund of excise duty collected. It was in view of this decision that the petitioners, relying upon the certificates produced by them at the material time, applied for refund of the countervailing duty collected from

them on 23rd January, 1979.

5. In view of the decision of the Collector of Customs (Appeals) in the case of Atic Industries Limited and in view of the fact that the petitioners have produced evidence to show that Naphthalene imported by them under their invoice of 23rd December, 1977 is derived from coal-tar and not from petroleum, the petitioners are entitled to classify Naphthalene so imported under Central Excise Tariff Item 68 for the purpose of countervailing duty. In view of the said exemption notification no countervailing duty can be levied on Naphthalene imported by the petitioners under the said invoice. The refund application of the petitioners, however, was rejected by the Assistant Collector of Customs under his order dated 25-1-1979/6-2-1979 on the ground that the claim for refund was barred by limitation prescribed u/s 27(1) of the Customs Act, 1962. The petitioners filed an appeal from this order. The appeal however, was rejected by the 3rd respondent under his order dated 30-3-1979 also on the ground that the claim for refund was barred u/s 27(1) of the Customs Act, 1962. The petitioners filed a revision petition from this order. The 1st respondent, however, by his order dated 28th January, 1981 rejected the revision petition also on the same ground. The petitioners have filed the present petition on 27th February, 1981.

6. The short question which requires consideration is whether the petitioners are entitled to any refund of the countervailing duty so recovered from them in view of the provisions of Section 27(1) of the Customs Act, 1962.

7. u/s 27(1) at the material time any person claiming the refund of any duty paid by him in pursuance of an order of assessment is required to make such application before the expiration of six months from the date of payment of duty. It is, therefore, necessary to consider whether the provisions of Section 27(1) apply to the petitioners' claim for refund of countervailing duty. In this connection, there is a basic distinction between a duty which is levied without jurisdiction and a duty which is levied under an error of law or fact. In the case of orders passed by the Customs authorities which are without jurisdiction provisions of Section 27(1) cannot be attracted because the act of levying duty in such a case is totally without any authority of law. In such a case the party aggrieved can ask for recovery of the duty on the basis that the amount has been paid under a mistake of law within three years of the date of discovery of mistake. For such claims the provisions of Section 27(1) of the Customs Act, 1962 are not attracted. The provisions of Section 27(1) can be attracted only in respect of refund of such duty which has been collected under the provisions of the Customs Act, 1962, either under some error of law or fact or for any other reason which may entitle the party concerned to apply for a refund under the Act.

8. The distinction between an action of the tribunal or an administrative authority which is without jurisdiction and an action which is under an error of law has been considerably whittled down by judicial decisions over a period of time. Commenting on "jurisdictional errors" Wade in his book on Administrative Law, 5th Edition at page 263 has observed,

"In fact "jurisdiction" has traditionally borne the wide sense, synonymous with "power"; for plainly a tribunal must not only have jurisdiction at the outset but must retain it unimpaired until it has discharged its task..... if a tribunal in the course of its inquiry addressed itself to the wrong question or violated the rules of natural justice, it thereby stepped outside its jurisdiction."

Jurisdictional errors can also be based on wrong findings of fact e.g. a tribunal dealing only with agricultural land cannot rule on non-agricultural land. Since the factual position regarding non-agricultural land is the same, at the outset, the tribunal was never entitled to entertain the case at all. Error as to the nature of land goes to the root of jurisdiction. Applying the same logic in the present case, if Naphthalene is not a petroleum product but is a product derived from coal-tar, this must be so at the outset. The Customs authorities were not entitled to levy any countervailing duty at all on this product. The levy of countervailing duty, therefore, is an act which is wholly without jurisdiction.

9. This concept of actions without jurisdiction was expounded and extended in the case of *Amisminic Ltd. v. Foreign Compensation Commission* 1969 (2) A.C. 147. The decision has been subsequently approved by the House of Lords in the case of *In re : Recall Communications Ltd.*, reported in (1981) A.C. 374. The Court in that case has observed as follows :

"..... where Parliament confers on an administrative tribunal or authority, as distinct from a Court of law, power to decide particular questions defined by the Act conferring the power, Parliament intends to confine that power to answering the question as it has been so defined; and if there has been any doubt as to what that question is, this is a matter for courts of law to resolve in fulfilment of their constitutional role as interpreters of the written law and expounders of the common law and rules of equity. So if the administrative tribunal or authority have asked themselves the wrong question and answered that, they have done something that the Act does not empower them to do and their decision is a nullity. Parliament can, of course, if it so desires, confer upon administrative tribunals or authorities power to decide questions of law as well as questions of fact or of administrative policy; but this requires clear words, for the presumption is that where a decision-making power is conferred on a tribunal or authority that is not a Court of law, Parliament did not intend to do so."

Hence, if a tribunal asks itself a wrong question and answers it ignoring the material which was available to it, it does something which it is not empowered to do in law and thus acts outside the jurisdiction conferred. The decision in the *Anisminic* case has been cited with approval by the Supreme Court in the case of *Union of India (UOI) Vs. Tarachand Gupta and Bros.* . In that case in para 21 the Supreme Court has quoted with approval the observations of Lord Reid in that case and has held that "a determination which the officer has no right to take into account, is no determination and in such cases the officer acts without jurisdiction". It has said that when such a decision is made, inter alia, by refusing to take into account something which the tribunal was required to take into

account or when it bases its decision on some matter which, under the provisions setting it up, it had no right to take into account, it would be acting in excess of jurisdiction. In such a case the order would be a nullity though it was an order of the kind which it was entitled to make in a proper case.

10. In the course of his able arguments, Mr. Shroff, learned Counsel for the petitioners cited several judgments before me. In the case of Maharashtra Vegetable Products Pvt. Ltd. v. Union of India and others, reported in 1981 E.L.T. 468 (Bom.) a Division Bench of the Bombay High Court was required to consider refund of excise duty wrongly collected on post-manufacturing expenses. The Court held that such collection was exercising powers without jurisdiction. It would not, therefore, attract the bar of limitation prescribed under Rule 11 of the Central Excise Rules, 1944 for the purpose of refund.

11. Similarly, another Division Bench of this court in the case of Wipro Products Ltd. and another v. Union of India and another reported in 1981 E.L.T. 531 (Bom.) held that if the levy of Central Excise was totally without jurisdiction and outside the provisions of Section 4 of the Central Excises and Salt Act the bar of limitation prescribed under Rule 11 of the Central Excise Rules was not applicable. That was also a case where the excise duty was levied by taking into account post-manufacturing expenses. (See also in this connection Associated Bearing Company Limited v. Union of India and another, reported in 1980 E.L.T. 415 (Bom.).

12. In the case of Indian Dairy Corporation v. Union of India, reported in 1981 E.L.T. 926 the goods were short landed. The Bombay High Court held that the recovery of duty on short landed cargo was without authority of law as no duty could have been levied on non-existent goods. It was not open, therefore, for the department to fall back upon the period of limitation prescribed in Section 27 of the Customs Act and hold the refund claim as time-barred. A Division Bench of the Madras High Court has also taken a similar view in the case of Assistant Collector of Customs, Madras and Others v. Premraj and Ganapatraj and Co. (P) Ltd., reported in 1978 E.L.T. (J 630). That was a case where the duty was paid without taking into account an exemption notification. The Madras High Court held that this amounted to recovery of tax without the authority of law and hence Section 27 of the Customs Act would not apply to such a case.

13. In the present case also countervailing duty has been recovered while in law no countervailing duty is leviable. Therefore, the collection of such countervailing duty is without authority of law. Hence, the provisions of Section 27 of the Customs Act would have no application to the recovery of such duty. The Supreme Court in the case of Shri Vallabh Glass Works Ltd. and Another Vs. Union of India (UOI) and Others, was concerned with a case where there was a dispute as to classification. In that case there was a dispute between the manufacturer and the department as to the taxability of the goods under a certain tariff item. The claim of the manufacturer was upheld by the Government. The claim of the manufacturer for recovery of excise duty on the

ground that the goods were taxable under a tariff item different from that under which they were claimed to be taxable earlier, was held maintainable. The Supreme Court held that the period of limitation in such cases would be on the basis that it was a claim for refund of amounts paid under a mistake of law. The Supreme Court, therefore, allowed the claim for refund for three years from such time as the petitioners discovered their mistake. In that case it allowed refund of all excess payments made on or after September 28, 1973 i.e. within a period of 3 years prior to the date on which the Civil Application concerned was filed.

14. In view of these authorities learned Counsel for the petitioner has submitted that the mistake in the present case relating to classification is a mistake which goes to the root of jurisdiction. I am inclined to accept this submission.

15. On behalf of the respondents it was pointed out by Mr. Shah, learned Counsel for the respondents that the error in classifying Naphthalene under Tariff Item 11A was merely an error of law which does not go to the root of jurisdiction of the Customs authority. In support of his contention he relied upon a decision of the Supreme Court in the case of Bata Shoe Co. Ltd. Vs. City of Jabalpur Corporation, . In that case the question related to the recovery of octroi under the C.P. & Berar Municipalities Act, 1922. u/s 83(1) of that Act an appeal is provided against the assessment of octroi. Under sub-section (1-A) of that section the person aggrieved by the decision of the Appellate authority has a right to apply to the State Government for revision on the ground (a) that the decision is contrary to law or is repugnant to any principle of assessment of a tax, or (b) that the appellate authority has exercised a jurisdiction not vested in it by law or has failed to exercise the jurisdiction vested in it by law. u/s 84 the orders passed by the special tribunals are final and no objection shall be taken to any valuation, assessment or levy etc. in any other manner or by any other authority than is provided in the Act. Thus, under the provisions of the said Act power was given to the Special Tribunal to examine the question of jurisdiction or lack of jurisdiction in levying octroi. In view of these provisions the Supreme Court held that the jurisdiction of a Civil Court to try a suit challenging assessment or levy of octroi was ousted. The Supreme Court said that by reason of the existence and availability of these special remedies, the ordinary remedy by way of a suit would be excluded on a true interpretation of Section 84(3). In the absence of similar provisions in the Customs Act, this decision does not hold the respondents.

15A. The respondents also relied upon a decision of a Single Judge of this Court in the case of Paper Products Limited v. Union of India, reported in 1981 E.L.T. 538 (Bom.). In that case the dispute related to the classification of certain type of paper. The Court held that if the duty paid by mistake is declared by the competent court to be invalid in law, it will fall within the purview of Section 72 of the Contract Act and the Government is under an obligation to refund it. The respondents relied upon the observations in that case in paragraph 44 where the learned Judge has observed that "mere classification of entries cannot amount to

the passing of order beyond jurisdiction". The observations in the above case which are obiter, lose much of their force after the decision of the Supreme Court in the case of Shri Vallabh Glass Works Ltd. (Supra). In the present case the goods imported were not subject to countervailing duty. By virtue of a wrong classification, countervailing duty was levied upon these goods. Such a levy is, therefore, without the authority of law and is therefore beyond the jurisdiction of the Customs authorities.

15B. My attention was also drawn to a decision of my brother Pendse J. in the case of May & Baker Limited v. The Municipal Corporation of Greater Bombay and anr. being Misc. Petition No. 906 of 1975 decided by Pendse J. on 21st September, 1979. This was again a case where the levy of octroi duty under the Bombay Municipal Corporation Act on glass ampoules brought into Bombay by the petitioners was under consideration. Under Rule 26 of the Bombay Municipal Corporation (Levy of Octroi) Rules, 1965 there was a provision for refund of octroi paid wrongly or in excess. Under that rule, when octroi has been wrongly recovered or has been recovered in excess through inadvertence, error, misconstruction, misinterpretation or any other reason on the part of the Municipal Octroi staff, such excess may be refunded provided that such a claim for refund together with various documents mentioned therein is lodged within 3 months from the date of its recovery. In view of the specific provisions of this rule the learned Judge held that the application for refund should have been made within 3 months, even in the case of Mis interpretation of an entry. The learned Judge in terms distinguished the provisions of this rule from the provisions of Section 27(1) of the Customs Act and held that the wording of Rule 26 was totally different from the wording of Section 27(1) of the Customs Act and distinguished that section by saying that there was no provision u/s 27(1) for refund in case the recovery is through inadvertence, error, mis-construction or Miss interpretation. In view of these observations it is difficult to see how this decision can be of any assistance to the respondents.

16. It was next submitted by the respondents that even if the petitioners are right in contending that countervailing duty has been wrongly recovered, refund should not be granted to them in the exercise of jurisdiction under Article 226 of the Constitution of India because this would amount to an unjust enrichment of the petitioners. This doctrine of "unjust enrichment" is at times invoked in matters relating to recovery of excise duty. In such cases the State urges that a manufacturer who has passed on the burden of excise duty to his customer, should not be allowed to obtain a refund of such duty from the State. I need not go into the merits or demerits of this doctrine. But in the case of I.T.C. Limited Vs. M.K. Chipkar and others, on a difference of opinion between two brother Judges of this Court, Shah J., by his judgment dated 9-4-85 has held that a manufacturer cannot be denied refund of excise duty unlawfully collected on the ground that he passed on the burden of duty to his customers. In his judgment he has considered the latest Supreme Court decisions while arriving at this finding.

17. As far as the present petition is concerned, the petitioners imported Naphthalene for their own consumption. This is a raw material required by the petitioners themselves for the manufacture of dye-stuffs and dye-intermediates. The question of passing on the burden of duty to consumers does not therefore arise. Mr. Shah has urged that ultimately the countervailing duty levied on Naphthalene will be reflected in the price at which the final product manufactured by the petitioners will be sold. There is no material on the basis of which I can hold that this will, in fact be so. Price fixation of any product is a result of several factors. Market conditions may or may not permit a manufacturer to charge any price he may want to impose. The respondents have not filed any affidavit disclosing anything which would indicate that there is any change in the price of the final product manufactured by the petitioners and sold by them as a result of the levy of countervailing duty on Naphthalene. In any case, in the absence of any factual basis for this submission, such a submission cannot be accepted.

18. The petitioners have prayed for interest at the rate of 18% per annum on the duty collected from the date of the petition till payment. In the case of Elpro International Ltd. Vs. Joint Secretary, Govt. of India, Ministry of Finance and Others, the Supreme Court has awarded interest on duty which was wrongly collected. The Supreme Court has awarded a lump-sum interest of Rs. 50,000/- in that case when the duty had been wrongly collected in the year 1966. In the case of Metal Distributors Ltd. and another Vs. Union of India and others, this High Court also awarded interest at the rate of 12% per annum on the excise duty which was collected illegally. In the interest of justice and looking to the circumstances of the case it would be just and fair to award to the petitioners interest at the rate of 12% per annum from the date of the petition till payment.

19. In the premises, the petition is allowed and the rule is made absolute with costs as prayed, save and except that interest will be at the rate of 12% per annum. The said amount will be refunded to the petitioners within a period of 4 weeks from today.