

(1980) 09 DEL CK 0020

In the Delhi High Court

Case No : Civil Writ Petition No. 54 of 1980

Bawa Potteries, Mehrauli

APPELLANT

Vs

Union of India and another

RESPONDENT

Date of Decision : 09-09-1980

Acts Referred:

Citation : (1992) 40 ECR 152 : (1981) 8 ELT 114

Hon'ble Judges : S. Ranganathan, J;Prakash Narain, J

Bench : Division Bench

Judgement

S. Ranganathan, J.—The petitioner is a manufacturer of crockery and porcelain ware in its factory at Mehrauli. It was selling its manufactured goods through its own selling depots in various parts of the country at a uniform retail price as per their price list. The petitioner had no price list showing the ex-factory price or the wholesale cash price for purposes of Section 4 of the Central Excises Act. The Central Excise authorities determined the assessable value of the goods of the petitioner for the purposes of levying excise duty on the basis of the retail prices. It will be appreciated that the retail prices at which the petitioner sold the goods were burdened with the various expenses of the post-manufacturing stage such as establishment, advertisement, distribution expenses, cartage, railway freight, special packing charges and so on. The petitioner claimed that the wholesale cash price or the dutiable value should be arrived at by deducting the following percentages from the retail sale price :

2. The petitioner from time to time submitted its consumers' price list which was accepted by the Revenue after deducting the expenses attributable to post-manufacturing process referred to above. However, in the year 1962 the Supdt, Central Excise, did not allow discount and other expenses referred to above but only allowed trade discount to the extent of 12-1/2%. The petitioner made a representation to the Asstt. Coll. of Central Excise who by his order dated 30-3-1962 allowed a trade discount of 25%. An appeal was rejected on a technical ground. There was a further revision preferred to the Government

which resulted in the allowance of trade discount of 25% and cartage of 5 % from the retail sale price. The balance of the claim in regard to 32% of the retail sale price was disallowed.

3. Thereupon the petitioner preferred C.W. 545/67 in this court. This writ petition came up before Rangrajan J. who disposed of the same by his order dated 20th May 1969. [See 1978 E.L.T. (J 168). After discussing the relevant case law the learned judge came to the conclusion that the only means for ascertaining the wholesale price in a case like this was to deduct from the retail price the necessary items of expenditure which belonged to the post-manufacturing stage. The only question was regarding the percentage claimed by the petitioner on the various items of deductible expenses. In para 3 of this order the learned judge pointed out that insofar as the percentage claimed on the aforesaid items as concerned there could be no serious controversy, as a fact, because the petitioner-company had been utilising the services of a Chartered Accountant of standing and the above figures had been worked out for the assessment period, namely, 1962-63 in accordance with the figures mentioned by the Chartered Accountant and there was no evidence, contra. There was no attack on the retail price list, However, towards the end of his judgment in paragraph 21 the learned judge observed as follows :

"At one stage I was inclined to take the figures given by the Chartered Accountant concerning the Railway freight, distribution, advertisement and insurance and straightway quash the duty on that basis, but Shri Brij Bans Kishore indicated at the latter stage of the argument, that these might be worked out in the event of my holding that these items had to be deducted, by the revenue authorities themselves. In this view the order of assessment of the Asstt. Coll. of C.E. confirmed in revision quashed with the direction that the Asstt. Coll. of Customs, who dismissed the petitioner's appeal on the ground that the demanded tax was not paid, shall decide afresh in the light of the legal principles mentioned in this judgment."

4. When the matter, thus went back to the Assistant Collector of Central Excise he passed an order on 18-10-1973 by which he allowed the petitioner a refund of Rs. 3.41 lacs. We are not concerned here with the items of deductions allowed except only the figure relating to breakages. As mentioned already the claims of the petitioner in this regard was to the extent of 10%. Dealing with this the Assistant Collector observed that "breakages had been allowed at a uniform rate of 10% on the basis of a certificate of an insurance company of repute and as admitted by the Court." The refund determined by the Assistant Collector was actually made to the petitioner on 26-2-1974.

5. Thereafter, on 6th November, 1974 the successor Assistant Collector issued a notice purporting to be under rule 10 of the Central Excise Rules. He was of opinion that the allowance of deduction on account of breakage from the retail price at 10% made in the order date 10-10-1973 was not correct inasmuch as "no actual expenditure was incurred on account of insurance. What the court had

allowed was only insurance charges". He, Therefore, proposed to revise the earlier order and to call upon the petitioner to refund the excess amount of Rs. 1.25 lacs paid over to him as a result of the earlier determination. It may be mentioned here that the refund granted as well as the claim for recovery of a part of the excise refund allegedly made related to the years 1961 to 1966.

6. The petitioner filed reply to the show cause notice on 27th November, 1974. It was submitted that the loss on account of breakage was claimed because the retail prices had been loaded by 10% to cover the loss of breakage in transit. It was stated that instead of getting the goods insured with an insurance company against breakage the petitioner took upon itself the liability to indemnify the breakage in transit and cover the loss arising thereby. The breakage was calculated by them reasonably at 10% as normally insurance companies charged 10% for insuring against the breakage. This was substantiated by a certificate from a reputed insurance Company, namely, M/s. General Insurance Company. The claim for excluding this from the retail price was, Therefore, well founded and in fact had been accepted by Rangrajan J. in principle and the matter had been remitted to the Assistant Collector only to verify the figures. It was also contended that no power of review lay in the assessing authority in respect of an earlier order which is passes after full consideration.

7. On 25th March, 1975 the Assistant Collector passes an order directing the petitioner company to pay a sum of Rs. 1.25 lacs within 10 days being the excess amount of refund granted to it under the earlier order. According to him the claim in regard to breakage could not be allowed because the party could not show that the expenses on account of breakage on insurance had been incurred by them. The objection to action under Rule 10 was also rejected and a demand was made in the terms above referred to. The petitioner preferred an appeal to the Appellate Collector which was successful. The Appellate Collector pointed out that before the High Court the figures mentioned by the petitioner had not been contradicted by the department and the retail price list had also not been attacked. The High Court was almost on the point of accepting the figures supplied to them and quashing the original assessment order on that basis. Breakage allowance to the extent of 10% in the case of crockery which is fragile was unavoidable and was also admitted by the High Court. After the High Court's order against which no appeal had been preferred the order disallowing the insurance cover against breakage was unsustainable. He also held that if the earlier order of refund was found to be erroneous, it should have been revised by the Central Government u/s 35A and it was not open to review by invoking rule 10. The above order was dated 25th October, 1975.

8. On 6th October, 1976 the Central Government issued a notice to the petitioner u/s 36(2) of the Central Excise and Salt Act, 1944 proposing to revise the order dated 25th October, 1975 passed by the Appellate Collector. After obtaining the petitioner's reply and affording an opportunity for personal hearing, the Government revised the order dated 25th October, 1975 and restored the order

of the Assistant Collector dated 25th March 1975. According to the revisional authority, the High Court had merely laid down certain principles and directed the department to work out the admissible deduction on the basis of the principles set out in the judgment. The court referred only to insurance charges as being eligible for deduction. But what the petitioner claimed before the Appellate Collector was not insurance charges but a breakage allowance which was a totally different concept from the concept of insurance. In the view of the Government the order the Appellate Collector holding that the breakage allowance was admissible on the ground that it was an insurance allowance was clearly wrong. The Assistant Collector was also held justified in taking action under the provisions of Rule 10. This order of the Government is dated 27th July, 1979 and has given rise to this writ petition.

9. Before proceeding to deal with the contentions raised on behalf of the petitioner, it is necessary to clarify that the decision of the Rangrajan J. cannot be considered to have decided the issue presently in dispute. At that stage, the only question was whether any deductions could be permitted from the retail sale price and this was answered in the affirmative. No doubt the learned judge observed initially that the various items enumerated (one of which was referred to as "insurance covering breakage") appeared to be post-manufacturing expenses, but the exact nature of this item was not specifically considered by the learned judge, through Mr. Gupta states that in the writ petition the assessed had explained in detail how the percentage of 10 had been arrived at. However, it is clear, from the concluding paragraph of the judgment that ultimately the learned judge decided to leave the issue of permissible deductions open for consideration by the appropriate authorities as requested by the learned counsel for the respondent. It is, Therefore, not possible to say that the learned judge had decided that this deduction should be allowed and that it was not open to the respondents to consider the matter at all.

10. Learned counsel for the petitioner raised three contentions :-

(i) The refund having been granted by the order of an Assistant Collector dated 19-10-1973 after a careful consideration of the various points involved, it was not open to another Assistant Collector to "review" that order merely because he thought it was wrong and to hold to the contrary;

(ii) the order dated 25-3-1975 passed under Rule 10 was barred by limitation as the proceedings for the review commenced after the expiry of three months from the date of grant of refund; and

(iii) The refund had been correctly granted to the petition and its withdrawal was not in accordance with law.

11. The first two contentions turn on the language of Rule 10 and hence it is necessary to set out the provisions of rule as it stood at the relevant time :

"10. Recovery of duties or charges short-levied, or erroneously refunded :-

(i) 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 proper officer may, within the 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, serve a notice on the person from whom such deficiency in duty or charges is or are recoverable requiring him to show cause to the Assistant Collector of Central Excise why he should not pay the amount specified in the notice.

(ii) The Assistant Collector of Central Excise, after considering the representation, if any, made by the person on whom notice is served under sub-rule (1), shall determine the amount of duty or charges due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined within ten days from the date on which he is required to pay such amount or within such extended period as the Assistant Collector of Central Excise may, in any particular case, allow."

It will be seen at once that the first contention urged by the learned counsel for the petitioner is untenable. In the very nature of the levy of excise duty, the initial decision to levy or not to levy duty has most often to be taken very expeditiously. It is no doubt true that there is provision enabling a provisional assessment initially to be followed on by careful consideration later on and that in the case of a refund order there may not have been the same amount of haste as in a case of levy. Nevertheless, the legislature has considered it expedient to confer on the assessing authority itself a limited power of review where, according to him or his successor, the earlier order is erroneous. The language of the rule clearly postulates the existence of a prior quasi-judicial determination by way of levy of duty or grant of refund or a decision not to levy duty and confers on the same authority a power of review of the earlier decision, subject to the fulfillment of the conditions mentioned in the rule and subject to action for review being taken within the prescribed period of limitation. The Supreme Court in Assistant Collector of Central Excise, Calcutta Division Vs. National Tobacco Co. of India Ltd., observed :

"The term "levy" appears to us to be wider in its import than the term "assessment". It may include both "imposition" of a tax as well as assessment. The term "imposition" is generally used for the levy of a tax or duty by legislative provision indicating the subject matter of the tax and the rates at which it has to be taxed. The term "assessment", on the other hand, is generally used in this country for the actual procedure adopted in fixing the liability to pay a tax on account of particular goods or property or whatever may be the object of the tax in a particular case and determining its amount. The Division Bench appeared to equate "levy" with an "assessment" as well as with the collection of a tax when it held that "when the payment of tax is enforced, there is a levy". We think that,

although the connotation of the term "levy" seems wider than that of "assessment", which it includes, yet it does not seem to us to extent "to collection". Article 265 of the Constitution makes a distinction between "levy" and "collection". We also find that in *N.B. Sanjana, Assistant Collector of Central Excise, Bombay and Others Vs. The Elphinstone Spinning and Weaving Mills Company Ltd.*, this court made distinction between "levy" and "collection" as used in the Act and the Rules before us. It said there with reference to Rule 10 :

"We are not inclined to accept the contention of Dr. Syed Mohammed that the expression "levy" in Rule 10 means actual collection of some amount. The charging provision Section 3(1) specifically says, "there shall be levied and collected in such a manner as may be prescribed the duty of excise. It is to be noted that sub-section (1) used both the expressions "levied and collected" and that clearly shows that the expression "levy" has not been used in the Act or the Rules as meaning actual collection."

We are, Therefore, unable to accept the view that, merely because the "account current", kept under the third proviso (erroneously mentioned as second proviso by the Division Bench) to Rule 9, indicated that an accounting had taken place, there was necessarily a legally valid or complete levy. The making of debit entries was only a mode of collection of the tax. Even if payment or actual collection of tax could be spoken of as a defacto "levy" it was only provisional and not final. It could only be clothed or invested with validity after carrying out the obligation to make an assessment that justify it. Moreover, it is the process of assessment that really determines whether the levy is short or complete. It is not a factual or presumed levy which could, in a disputed case, prove an "assessment", This has to be done by proof of the actual steps taken which constitute "assessment".

12. In the context of these observations, it is quite clear that there could have been no non-levy or short-levy except by a process of assessment; likewise a refund could have been directed only after making a like determination of a quasi-judicial nature. It is Therefore, difficult to accept the contention that the rule is not attracted merely because the earlier order has been passed after a detailed consideration. The rule permits a review when the appropriate authority comes to a conclusion that the earlier decision was erroneous and that more duty should have been levied or that no refund ought to have been granted, such error having crept in inter alia due to "inadvertence, error, collusion, or misconstruction on the part of an officer". These words are very wide and clearly cover the circumstances of the present case, as according to the respondents, the refund was erroneously granted due to misconstruction of law and the earlier order of Rangrajan J. If the order of review is incorrect, it is, of course, subject to correction by appeal, further revision and, in appropriate cases, by judicial review in a writ petition but it is not open to objection on the ground that the authority has no jurisdiction to review a considered order.

13. On the second contention, the plea of the petitioner is, on the face of it,

borne out by the language of the rule, the extended period of limitation contemplated by which is obviously, and also admittedly, not available to the respondents in the present case. Counsel for the respondents however seeks to overcome this objection on the ground that the present case is covered by Rule 173-J which is in the following terms :-

"173-J. Time limit for recovery of short levy or refund of excess levy. - The provisions of rules 10 and 11 shall apply to the assessed as if for the expression "three months" the expression "one year" were substituted in those rules."

Though there is some difficulty in the construction of this rule, we are of opinion that the contention of the learned counsel for the respondents should be accepted.

14. Rule 173-J has, it will be noticed, a reference to Rule 10 as well as Rule 11. Rule 10 relates to the recovery by the department in case of short-levy or excess refund whereas Rule 11 gives the assessed a right to ask for refund where he finds that the department has collected more duty than it ought to have. The ambiguities in Rule 173-J are (i) that its heading refers to "short levy" which is only one of the two eventualities mentioned in Rule 10 and to "refund of excess levy" which is the subject-matter of Rule 11 giving scope for an argument that the other eventuality of Rule 10 viz. erroneous refund of a proper levy is not covered by it; and (ii) that it refers to Rule 10 and 11 applying "to the assessed", thus giving scope for an argument that it does not apply to the department acting under Rule 10. But we agree with Mr. Chandrasekharan that these are minor lapses in drafting and that the rule fully applies to the present case. There is no logical reason why the rule should attract the applicability of Rule 10 only in respect of one of the two eventualities; the reference in the title to Rule 173-J is really a broad reference to the contents of rule 10 and should not be read as limited only to one type of action taken under Rule 10. Equally undue emphasis on the word "to the assessed" in the manner suggested by the petitioner will render nugatory the reference to Rule 10 in the body of the rule. We think that on a fair reading of the rule it is clearly applicable to the review of a case of erroneous refund under Rule 10. The third difficulty posed by Mr. Gupta, was that in the present case we are concerned with the excise duty levied and collected for the assessment period 1961-66 whereas Rule 173-J came into force only in 1968. This again does not help the petitioner. What is attempted to be reviewed under Rule 10 is an order of refund made on 19-10-1973. This order was passed much after 1968 and its review ability will, Therefore, be governed by Rule 173-J read with Rule 10. The objection that the notice preceding the order dated 19-10-1973 mentioned only Rule 10 does not also affect the validity of the order passed because Rule 173-J is not an independent rule by itself; it only directs the application of provisions of Rule 10, in certain cases with a modification regarding the period of limitation.

15. This takes us to the third and last contention of Mr. Gupta on the merits of the order under Rule 10 which has been revived by the order in revision of the

Govt. He contends that the Government is wrong in thinking that Rangrajan Justice permitted a deduction only in respect of premia paid for insurance against breakage off goods in transit. The case of the assessed all along had been, that since substantial loss due to breakage in transit of the fragile goods manufactured by the petitioner was an inevitable incident of the business, the assessed had to take this into account in fixing its sale price. Since the loss incurred at the post-manufacturing stage, this element of "inflation" included in the sale price represented a post-manufacturing element which had to be excluded for excise duty purposes in view of the law settled by A.K. Roy and Another Vs. Voltas Limited, and Atic Industries Ltd. Vs. H.H. Dewa, Asstt. Collector of Central Excise and Others, .

16. Counsel for the respondents does not deny that the loss due to breakage claimed by the assessed occurs after the goods leave the factory. Indeed the Rules make an allowance in respect of loss due to breakage in the process of manufacture and usually no question arises in regard thereto. What he says, however, is that what the assessed is really seeking is to exclude from the manufacturing cost the cost of manufacture of a part of the goods manufactured which after their manufacture and removal from the factory, are lost to the assessed and that too not on the basis of actualities but on estimate. We do not think that the fact of the assessed's claim being based on an estimate can vitiate it but we find substance in Mr. Chandrashekheran's contention that the allowance of this loss will really result in the exclusion from the excisable value the manufacturing cost of a part of the excisable goods. The goods attract excise duty at the point of manufacture and removal (Section 3, Rule 9 and 49); their loss to the assessed subsequently is immaterial from the point of view of excise duty. We have, Therefore, come to the conclusion that, plausible as the assessed's claim may sound, the claim of the assessed will really result in the reduction from the sale price a portion of the element of the assessed's manufacturing cost included in it, which is the subject matter of levy. This loss cannot be approximated to insurance premium paid for breakage in transit for purposes of sale which will clearly be a post-manufacturing expense.

17. We, Therefore, reject the contentions of the petitioner, discharge the rule and dismiss the writ petition. We, however, make no orders as to costs.