

(1978) 12 MAD CK 0009

In the Madras High Court

Case No : Writ Petition No. 1526, 1652 and 4471 of 1976 and 32 of 1977

Binny Limited and Others

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 05-12-1978

Acts Referred:

Constitution of India, 1950 — Article 226

Contract Act, 1872 — Section 72

Limitation Act, 1963 — Article 96, 17

Citation : (1979) CENCUS 290 : (1979) 4 ELT 230

Final Decision : Dismissed

Judgement

1. The common question for consideration in all these petitions is whether the respondents were entitled to levy and collect excise duty on blended

yarn prior to the introduction of Item No. 18E by the Finance Act, 1972, on the strength of Trade Notice, dated 10-5-1973 and Exemption

Notification No. 156/64, dated 16-10-1964, issued under Rule 8(1) of the Central Excise and Salt Rules, 1944 (hereinafter referred to as the

Rules). Having regard to the controversy, the prayer in the petitions is for a declaration that excise duty levied and collected on blended yarn prior

to the introduction of Item 18E is illegal and ultra vires and for a mandamus or direction to the second respondent to refund the excise duty

collected on blended yarn during the earlier period. Except for some difference in the periods for which refund of excise duty is asked for, the

petitioners have set out a common case in their respective petitions.

2. As illustrative of facts, the case in W.P. No. 1526 of 1976 can be referred to. The petitioner is an Amalgamation of six companies and is a

company incorporated under the Companies Act. The Buckingham and Carnatic Mills Unit of the petitioner company began manufacturing from

the year 1963 yarn containing more than one synthetic fibre or yarn containing synthetic fibre and natural fibre or, in other words, blended yarn as

known in trade circles. The blends of yarn manufactured by the petitioners are of the following types -

Polyester / Cotton

66-2/3% ... 33-1/3%

65% ... 35%

50% ... 50%

83-1/3% ... 16-2/3%

Polyester / Viscose

65% ... 35%

75% ... 25%

* * * * *

Taking into consideration the rival contentions of the parties, the questions that need determination can be formulated as follows --

1. Can blended yarn be considered an excisable item prior to the introduction of Item 18E by the Finance Act of 1972 on 16-3-1972.

2. If it is not an excisable item, can the petitioners seek refund of excise duty collected before 16-3-1972 by filing writ petitions instead of suits ?

and

3. Has there been delay in the filling of the writ petitions, and, if so, whether the petitioners are not entitled to reliefs in the petitions on the ground of limitation?

Let us first consider the principal question, whether, blended yarn was subjected to the impost of excise duty for the first time only on 16-3-1972,

by the introduction of Item 18E by the Finance Act of 1972. It is common ground that with effect from the introduction of Item 18E, blended yarn

is clearly covered by this newly added Item. It is equally an undisputed fact that the Revenue issued a trade notice on 10-5-1963, stating that

blended yarn will be held included in Item 18A (cotton yarn) and liable to excise impost as such and on 16-10-1964, the Revenue changed its

stand and notified under Notification No. 156/1964, that blended yarn would be covered by Item 18 (synthetic yarn) if the natural fibre contained

in such yarn was not more than 40 per cent. and on that basis, excise duty will be collected. Having regard to the shifting stand of the Revenue and

also the specific provision contained in Item 18E for blended yarn, Mr. K.K. Venugopal learned counsel for the petitioner in W.P. No. 1526 of

1976 argued and his arguments were adopted by the counsel for the petitioners in the other cases, that there cannot be any presumption in

construing a taxing statute and the subject is not to be taxed unless the charging provision clearly imposes the obligation. As authority for this

proposition, he referred to C.I.T. v. Ajax Products Ltd, 1965 1 I.T.J. 623. His further submission was that even assuming, for arguments sake,

that Items 18A and 18 were ambiguous in content and by reasons of that, there is some scope for the Revenue to contend that blended yarn would

be covered by these items also, the court should follow the well known dictum invariably adopted by courts vide Commissioner of Income Tax,

Punjab Vs. Kulu Valley Transport Co. P. Ltd., that even if two views are possible, the view which is favourable to the assessee must be accepted

while construing the provisions of a taxing statute". Apart from these general submissions, Mr. Venugopal relied heavily on the judgment of the

Gujrat High Court in the Ahmedabad Manufacturing and Calico Ptg. Co. v. Union of India and Ors., S.C.A. No. 1058 of 1972, Gujarat High

Court judgment, dated 15-1-1976, to sustain the claim of the petitioners for refund of excise duty collected under the Trade Notice of 1963 and

the notification in 1964. The learned Judges of the Gujrat High Court have held as follows --

This new Item (blended yarn) manufactured by the company could never answer the description of...purely synthetic yarn, cotton yarn or woollen

yarn so as to be covered under entries 18 to 18B, and that is why the Legislature has introduced the new entry 18E under the Finance Act of

1972, to cover up such blended yarn when its use had become widespread in the country. A contract for supply of blended yarn could obviously

be not discharged by mere supply of cotton yarn or mere supply of synthetic fibre yarn, because the customers are interested only in this particular

blending"".

In another portion of the judgment they have held as follows --

Therefore, on no process of construction, this new blended yarn produced by the

company could be treated as excisable item for the earlier

period before the Finance Act of 1972, which introduce a clear unequivocal Item No. 18E to cover such goods which were produced by the

mixture of two or more fabrics-man-made and natural. Therefore, the levy in the present case was clearly an ultra vires levy"".

13. The arguments of Mr. Venugopal are, no doubt, appealing and forceful. However, Mr, Chengalvarayan, Senior Central Government Standing

Counsel, attempted to sustain the stand of the Revenue by arguing that the words "all sorts" occurring in Item 18A will include blended yarn also

because it undoubtedly included a mixture of cotton yarn. Therefore, according to him, the collection of excise duty in terms of the Trade Notice,

dated 10-5-1963, was not ultra vires of the Act. As regards the notification No. 156/1964, which directed blended yarn being treated as synthetic

yarn for the purpose of excise impost, the learned counsel stated that a reasonable classification was made, i.e., wherever the synthetic fibre

content was more than 60 per cent. the yarn was included in the classification of ""rayon synthetic fibres and yarn"". According to Mr.

Chengalvarayan, the earlier classifications were made in accordance with Brussel Trade Nomenclature and such classification is an accepted

procedure in the application of fiscal provisions to goods akin to those referred to or enumerated in the taxing entry. He invited my attention to the

following passages occurring in Brussels Fourth Impression, 1966, volume 2, sections VIII to XV, Chapters 41 to 83, at pages 707-708 :

Goods classifiable in any heading in Chapters 50 to 57 and of a mixture of two or more different textile materials are to be classified according to

the following rules :

(a) Goods containing more than 10% by weight of silk, noil or other waste silk or any combination thereof are to be classified in Chapter 50, and,

for the purpose of classification in that Chapter, as if consisting wholly of that one of those materials which predominates in weight;

(b) All other goods are to be classified as if consisting wholly of that one textile material which predominates in weight over any other single textile

material"".

He also pointed out the following passages occurring at pages 710-711 of the same book :

A textile products falling within Chapters 50 to 57 composed of two or more different textiles is classified as the product of the same kind (waste, yarn, woven, fabric, etc.) of the textile which predominates in weight"" and ""When applying these rules governing the classification of mixed textiles, it should be noted that (1) When a heading refers to a product (waste, yarn, woven fabric) composed of textile materials of different kinds, those materials are aggregated together for the purpose of classifying a similar product containing those materials mixed with others. For instance, a fabric composed of 40% discontinuous man made fibres, 35% woollen yarn and 25% fine animal hair does not fall within heading 56.07 (woven fabrics of discontinuous man made fibres), but comes under heading 53.11 (woven fabrics of wool or of fine animal hair), since the proportions of wool and of fine animal hair must, in this case, be taken in the aggregate...

14. The further argument of Mr. Chengalvarayan was that Item 18E was not introduced to make blended yarn an excisable item for the first time in the year 1972, but was introduced with a view to bring uniformity in the matter of levy of duty on mixed yarn since it was capable of being assessed differently under Item 18A or Item 18. The judgment of the Gujarat High Court, so the respondents counsel argued, cannot advance the case of the petitioners in any manner, because, in that case, no identification had been made about the qualitative content of the synthetic yarn and cotton yarn in the blended shape, but in all the cases on hand, the proportion of mixture has been given by the petitioners themselves and therefore, the Brussels Trade Nomenclature can be applied without any difficulty in these cases.

15. Having regard to the differing arguments advanced by counsel of both sides, I do not feel myself called upon to make a final pronouncement on this question because I am of opinion that in all these cases the petitioners should file suits to seek reliefs and not writ petitions. I shall give the reasons for my view when I consider the next question.

In dealing with the second question, Mr. Venugopal argued that the petitioners are well within their rights in filing petitions under Article 226 of the Constitution of India and it is not necessary they should resort to the remedy of suits. On the other hand, Mr. Chengalvarayan urged that the question for consideration is a mixed question of law and fact and as such, the

petitioners should seek remedies only by means of suits. He would further say that the long delay in filing of the writ petitions should be taken note of by the court and the petitioners denied discretionary reliefs in these petitioners. Mr. Venugopal urged that both parties were labouring under a misapprehension in that, the Revenue included blended yarn as goods falling under Items 18A and 18 and the petitioners, believing the correctness and validity of the demands, paid the excise duty. It is, no doubt, true that if tax had been paid under a mistake of law, the party who made such payments is entitled to recover the same and the party receiving the amount is bound to return it. I may only refer to the dictum of the Supreme Court in this behalf in *Sales-tax Officer v. Mukandlal Saraf*, 1959 SCR 1350 --

The Privy Council decision in *Shiba Prasad Singh v. Srishchandra Nandi*, 1949 L.R. 76, has set the whole controversy at rest and if it is once established that the payment, even though it be of a tax, has been made by the party labouring under a mistake of law, the party is entitled to recover the same and the party receiving the same is bound to repay or return it. No distinction can, therefore, be made in respect of a tax liability and any other liability on a plain reading of the terms of Section 72 of the Indian Contract Act

Vide also *Patel India Private Limited Vs. Union of India and Others*, In *D. Cawasji and Co. and Others Vs. State of Mysore and Another*, it was held that where a suit will lie to recover money's paid under a mistake of law, a writ petition for refund of tax within the period of limitation prescribed i.e., within three years of the knowledge of the mistake would also lie. Placing reliance on these authorities, the petitioners' counsel argued that the petitioners need not file suits and can seek appropriate reliefs by means of writ petitions. No doubt, under normal circumstances, this contention has to be accepted. But, in the instant case this contention has to be accepted. But, in the instant case, the petitions have not been filed promptly. The First Trade Notice as well as the Exemption Notification which are impugned in these proceedings were issued in the years 1963 and 1964 respectively. Thereafter, Item 18E was introduced with effect from 16-3-1972. In spite of these things, the petitioners have come to court only in the years 1976 and 1977. The petitioners would say that they come

to know of the mistake of law only when they received information about the judgment of the Gujarat High Court in S.C.A. No. 1958 of 1972 in

1976. The respondents would, however, say that the discovery, even assuming it had been made by the petitioners only in 1976, is not purely one

of law, but a mixed question of fact and law, and therefore, the date when the Gujarat High Court rendered the judgment will not constitute the

starting point of limitation. According to the respondents, the petitioners had three opportunities to take note of the mistake now complained of,

viz., in the year 1963 when the Trade Notice was issued, in the year 1964 when the Exemption Notification was issued and in the year 1972,

when Item 18E was introduced, by means of the Finance Act of 1972. Then, again, it is stated that inasmuch as the proportion of diverse kinds of

yarn width went into the production of blended yarn is an ascertained factor in these cases, there will have to be a factual assessment to determine

whether the blended yarn manufactured by these petitioners would not be covered by Items 18A and 18 before the introduction of Item 18E and

such assessment can be made only in the course of a trial in suits instituted by the petitioners. It appears to me, there is considerable force in the

submission made by the respondents and as such, the ratio laid down by the Supreme Court in *State of Madhya Pradesh Vs. Bhailal Bhai and*

Others, will warrant application. The ratio as found in the headnote is to the following effect --

As a general rule, if there has been unreasonable delay the court ought not ordinarily to lend its aid to a party by the extraordinary remedy of

mandamus. Even if there is not such delay, in cases where the above said party raises a prima facie issue as regards availability of such reliefs on

the merits on grounds like limitation, the court should ordinarily refuse to issue the writ of mandamus".

Applying this ratio, I think the proper course to be followed in these writ petitions is to refuse to grant the petitioners the extraordinary remedy of

mandamus in these proceedings and to direct them to file suits if they are so advised to obtain refund of the alleged wrongful collection of excise

duty.

16. In view of the above finding on question No. 2, it is really not necessary to consider the third question, viz., whether the proceedings are

affected by limitation. As already stated, the petitioners would say that the excise duty on blended yarn had been paid under a mistake of law and

the mistake of law came to be known by the pronouncement of the Gujarat High Court in S.C.A. No. 1058 of 1972 and in terms of Section 17

(equivalent to Article 96 of the old Act) of the Limitation Act of 1963, the petitioners have a limitation period of three years to file writ petitions or

suits to ask for refund of tax. In support of this contention, Mr. Venugopal referred to K.S. Venkataraman and Co. Vs. State of Madras, . In that

case, the question of limitation has not been directly considered, but the majority judgment allowed the plaintiff's suit instituted on 23-3-1955 for

getting refund of sales tax paid during the years 1948-49 and 1952-53. Mr. Chengalvarayan submitted that it is not known whether the plea of

limitation was specifically raised in that case, and, secondly, the case was " exclusively based on discovery of a mistake of law, whereas, in the

petitions on hand, the discovery would be of mistake of fact as well as mistake of law, assuming there was such mistake. In view of my conclusion

that the parties should canvass their respective cases before the civil court, it is unnecessary to give any finding in these petitions whether the claim

of the petitioners is barred by limitation or not. Mr. Chengalvarayan pointed out that even in the Gujarat case, the relief of refund was confined to a

period of three years before the filing of the writ petition and if the same ratio is applied, the petitioners cannot get any relief, because the alleged

illegal collection of excise duty was beyond a period of three years before the filing of the writ petitions. This is, again, a matter which has to be

gone into by the civil court if and when it is approached by the petitioners for getting a refund of the alleged wrongful collections of excise duty.

17. Lastly, Mr. Chengalvarayan made two further submissions which are not contained in the counter. One argument was that the petitioners had

not paid the excise duty from out of their funds, but they had passed on the incidence of the duty to the consumers and as such, the petitioners are

not entitled to ask for refund of the duty even assuming the collection of the same was wrongful. The other submission was that the excise duty had

been expended by the Government for the common good and as such, it would be unjust to direct its repayment. So far as these submissions are

concerned, they seem to be answered against the Revenue by the Supreme Court in D. Cawasji and Co. and Others Vs. State of Mysore and

Another, in the following manner: --

A tax is intended for immediate expenditure for the common good and it would be unjust to require its repayment after it has been in whole or in

part expended, which would often be the case. If the suit or application could be brought at any time within three years of a court declaring the law

under which it was paid to be invalid, be it a hundred years after the date of payment. Nor is there any provision under which the court could deny

refund of tax even if the person who paid it has collected it from his customers and has no subsisting liability or intention to refund it to them, or, for

any reason, it is impracticable to do so"".

18. In view of my finding that there has been delay in the filing of the writ petitions and, as such, the petitioners cannot be granted the extraordinary

relief of mandamus in these proceedings, but must be directed to seek their remedies by means of civil suits if they are so advised, all the writ

petitions will have to fail. They will, accordingly, stand dismissed; but there will be no order as to costs. In the event of the petitioners filing suits in

the civil courts, the period of pendency of these writ petitions will stand excluded for computing the period of limitation u/s 17 of the Limitation Act.