

(1991) 06 CAL CK 0008

In the Calcutta High Court

Case No : Writ Petition Matter No. 3741 of 1990

Birla Jute and Industries Ltd.

APPELLANT

Vs

Assistant Collector of C. Ex.

RESPONDENT

Date of Decision : 12-06-1991

Acts Referred:

Central Excise Tariff Act, 1985 — Section 5(8)
Central Excises and Salt Act, 1944 — Section 37B
Constitution of India, 1950 — Article 226, 309
Government of India Act, 1935 — Section 241(2), 2A

Citation : (1994) 51 ECR 424 : (1992) 57 ELT 674

Hon'ble Judges : Ruma Pal, J

Bench : Single Bench

Advocate : R.N. Bajoria and S.K. Bagaria, for the Appellant; N.C. Roy Choudhury and P.K. Dutta, for the Respondent

Final Decision : Allowed

Judgement

Ruma Pal, J.—The petitioner company manufactures yarn. The yarn consists of 70% acrylic fibre and 30% artificial staple fibre of cellulosic origin. Since 1985 the Yarn was classified under Tariff Heading 55.04 under 5504.32 of the Schedule to the Central Excise Tariff Act, 1985 (hereinafter referred to as the Act.) The respondents now contend that the yarn is classifiable under Sub-heading 5504.39 of the Schedule to the Act. The relevant headings read as under :

"55.04 - Yarn (including sewing thread) of synthetic staple fibres. Yarn in which

acrylic or modacrylic staple fibre predominates by weight: 5504.32 - Yarn not containing or containing not more than one sixth by weight of other synthetic staple fibres, calculated on the total fibre content.

5504.39 - Others."

2. On 21-12-1989 a show cause notice was issued for revision of the classification list whereunder the yarn had been classified under 5504.32 seeking

to reclassify the yarn under 5504.39. The petitioner replied to the show cause notice but the Assistant Collector confirmed the re-classification of the yarn under 5504.39 by his order dated 28-2-1990. The petitioner preferred an Appeal from the order dated 28-2-1990 and also filed an application for stay. While the appeal and application were pending a second show cause notice was issued in respect of a classification list filed by the petitioner for the period effective from 30-10-1989. Demands were raised by the respondents on the petitioners on the basis of the order dated 28-2-1990.

3. The petitioner company filed this application under Article 226 challenging inter alia the order dated 28-2-1990, the demands raised on the basis thereof and the second show cause notice.

4. On 21-8-1990 the following order was passed by a learned Judge of this court:

"The learned counsel appearing for the respondents, on instructions from his clients, has given an undertaking on behalf of his clients that no attempt shall be made to realise the demands in terms of the order dated 2nd March, 1990 or no step will be taken in connection thereof, until the said appeal is disposed of. Under the circumstances, I am not inclined to pass any interim order.

However, the respondent No. 2 is directed to hear the appeal on 24th August, 1990 as far as practicable and shall dispose of the same by passing necessary orders with utmost expeditiously. If the appeal goes against the petitioner, the order shall be kept in abeyance for a week from the date of passing of the order and the petitioner shall be at liberty to file a supplementary affidavit incorporating all the subsequent facts.

The petitioner shall also be at liberty to collect the blended yarn in accordance with law.

In respect of subsequent periods, the respondents shall be at liberty to issue show cause notices but shall not take any further step until the disposal of this writ application and this includes the notice dated 20th February, 1990".

On 30-8-1990 the petitioners' appeal was dismissed. This order has also been challenged by way of a supplementary affidavit.

5. In the meantime at a conference of the Collectorate of Central Excise & Customs held on 7th and 8th June 1990 the issue regarding classification of Acrylic-Viscose Blended Yarns was considered. The minutes of the conference which have been brought on record by a second supplementary affidavit filed by the petitioner records (in so far as it is material) as follows :

"The conference further observed that from the description of the heading it might be seen that there was only a restriction on the usages of other synthetic Staple Fibre to the extent of 1/6 of the weight calculated on the total fibre contents; otherwise there was no other restriction as regard to the use of other Staple Fibre. Had it been the intention of the Government not to include such

yarn manufactured with predominance of Acrylic Fibre along with other textile materials (other than Synthetics Fibre) upto the specified limit, the same could have been stated quite specifically, as had been done in the description against Sub-headings 5504.21, 5504.22 and 5103.10 of CET. Accordingly the conference decided that appropriate classification of Acrylic and Viscose Blended Yarn which is a blend of 70% Acrylic Fibre and 30% Viscose Staple Fibre would be under Sub-heading No. 5504.32 of the CET, 1985.

The conference further desired that the Board instructions as contained in F. No. 55/5/88-CX. 1 dt. 7-7-1989 should be reviewed in the light of the above decision."

6. On 26th November 1990 Circular No. 25/90-CX. 1 (hereinafter referred to as the said circular) was issued by the Ministry of Finance, Government of India to

"All Principal Collectors

All Collectors of Central Excise

All Collectors of Central Excise & Customs

All Collectors of Central Excise & Constitution."

7. The said circular after noticing the recommendation of the Conference (quoted above) reads as follows :

"The matter has been further examined in the Board. On a reading of Section XI "Textiles and Textile Articles" of CET it is clear that, for the purpose of classification of blended yarn, the two important factors to be considered are (1) predominance of a particular fibres and (2) the wordings of Headings and Sub-headings. It is felt that, as per Section Notes 2(A) and 2(B). 2(B) (ii) of Section XI, the presence of any other textile materials in a blended yarn, even if it is not specifically mentioned, does not alter the classification of such a blended yarn, the classification of which depends on the two factors referred to above. The only exception is when the Government, as a conscious decision, makes it clear in the statute itself (Section Notes, Chapter Notes, Headings and Sub-headings) that a particular entry does not permit the presence of any other textile material in a blended yarn as is the case with Sub-headings 5504.21, 5504.22 and 5103.10 of CET. This is not so with the Sub-headings 5504.31 and 5504.32. In the absence of any indication that the two Sub-headings do not permit the presence of any other textile material the classification of blended yarns under those Sub-headings should be done in the light of section notes. As per Section 2(A) of Section. XI of CET, articles of a mixture of two or more textile materials are to be classified as if consisting wholly of that one textile material which predominates by weight over any other single textile material. As per Section Note 2(b)(ii), for the purpose of Note 2(A) the choice of appropriate heading shall be effected by determining first the chapter and then the applicable heading within that chapter, disregarding any material not classified in that chapter.

In view of the position stated above, the classification of blended yarn consisting of 70% acrylic fibres and 30% viscose, as discussed in the North Zone Tariff Conference would be under the Sub-heading No. 5504.32 as that Sub-heading does not preclude the presence of any other fibre."

8. On 24-1-1991 Trade Notice No. 15/Ch-55-I/1991 was issued by the office of the Collectorate of Central Excise, Calcutta. The relevant extract from the Trade Notice is as under:

"It has been decided that the classification of blended yarn consisting of 70% acrylic fibres and 30% viscose, would fall under the Sub-heading No. 5504.32 as that Sub-heading does not preclude the presence of any other fibre."

9. Copies of the Trade Notice were forwarded to all Chambers of Commerce, Recognised Trade Associations and Members, Regional Advisory Committee.

10. In this background the following three issues arise for determination :

I. The effect of the said circular on the question of classification of the yarn;

II. Classification of the yarn;

III. Scope of interference by the Court under Article 226 of the Constitution into question of classification under the Act.

I. The effect of the said circular on the question of classification of the yarn

11. It is not disputed that the circular is an Instruction issued u/s 37B of the Central Excises and Salt Act, 1944 (hereinafter referred to as the 1944 Act). The said section reads as follows :

"37-B. INSTRUCTIONS TO CENTRAL EXCISE OFFICERS.

The Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) may, if it considers it necessary or expedient so to do for the purpose of uniformity in the classification of excisable goods or with respect to levy of duties of excise on such goods, issue such orders, instructions and directions to the Central Excise Officers as it may deem fit, and such officers and all other persons employed in the execution of this Act shall observe and follow such orders, instructions and directions of the said Board :

Provided that no such orders, instructions or directions shall be issued -

(a) so as to require any Central Excise Officer to make a particular assessment or to dispose of a particular case in a particular manner; or

(b) so as to interfere with the discretion of the Collector of Central Excise (Appeals) in the exercise of his appellate functions."

12. This section was introduced in the 1944 Act by the Central Excises and Salt (Amendment) Act, 1985.

13. The petitioners have contended :

(i) Such instructions are not binding on the appellate/Revisional authorities exercising quasi-judicial functions in the matter of assessments or the Courts while hearing the Reference/Writs. In the interpretation of the provisions of the law which come up before such authorities they are not bound by the views expressed in such instructions. The assessee can always challenge the view expressed in such instructions and invite the quasi-judicial adjudicating authorities or the Court to decide its contentions on merits which may be contrary to such informations.

(ii) Such instructions are, however, binding on the taxing authorities and so long as they remain in force they cannot act contrary thereto. The Appellate/ Revisional authorities under the Act and/or the Courts in the Reference jurisdiction and/or the Writ jurisdiction can require such taxing authorities to act in accordance with such instructions and circulars.

(iii) Even if on the interpretation of the particular statutory provisions relief cannot be obtained by an assessee, such administrative circulars and/or instructions can grant such relief and when they do so the Taxing Authorities are bound to act in accordance with such instructions and circulars.

14. The Respondents have contended :

(i) While functioning quasi-judicially officers should not allow their judgments to be influenced by administrative consideration or by instructions or directions from superiors; any such direction is invalid and vitiates proceedings.

(ii) Instructions to Central Excise Officers issued by the Board are not binding on the authorities performing quasi-judicial functions.

(iii) Administrative instructions cannot have retrospective effect.

15. Several decisions have been cited by the petitioners and respondents in support of these contentions which are dealt with hereinafter.

16. It may be stated at the outset, that the cases cited by both sides in fact support the contentions put forward by both. Seemingly irreconcilable views appear to have been judicially expressed on this issue. Relevant extracts from the cases cited by the parties are set out below in chronological order :

(i) *Navnillal C. Javeri v. Commissioner of Income Tax, Bombay* reported in 1965 (LVI) ITR 198 at 203.

"In order that the assurance given by the Minister in Parliament should be carried out, a circular [No. 20 (XXI-6)/55] was issued by the Central Board of Revenue on the 10th May 1955. It is clear that a circular of the kind which was issued by the Board would be binding on all officers and persons employed in the execution of the Act u/s 5(8) of the Act."

(ii) *Ellerman Lines Ltd. Vs. Commissioner of Income Tax, West Bengal, Calcutta*, .

"Now, coming to the question as to the effect of instructions issued u/s 5(8) of the Act, this court observed in *Navnillal C. Javeri v. K.K. Sen*, Appellate Assistant Commissioner, Bombay :

"It is clear that a circular of the kind which was issued by the Board would be binding on all officers and persons employed in the execution of the Act u/s 5(8) of the Act. This circular pointed out to all officers that it was likely that some of the companies might have advanced loans to their shareholders as a result of genuine transactions of loans, and the idea was not to affect such transactions and not to bring them within the mischief of the new provision".

The directions given in that circular clearly deviated from the provisions of the Act, yet this court held that the circular was binding on the Income tax Officer."

(iii) *Tata Iron & Steel Co. Ltd. v. N.C. Upadhyaya and Anr.* reported in 1974 (96) ITR page 49 at 1.7.

"In view of the two judgments of the Supreme Court referred to hereinabove we hold that the circulars dated 16th November, 1968, exhibit A to the petition and 21 st November, 1958, exhibit B to the petition, would be binding on the Income Tax Officers and must be given effect to by this court. While so holding we must, however, strike a note of caution that the binding nature of circulars issued by the Central Board of Revenue must be confined to tax laws and that also for the purpose of giving administrative relief to the tax payer and not for the purpose of imposing a burden on him."

(iv) *Navnitlal Ambalal and Others Vs. Commissioner of Income Tax, Bombay City II*,

"We may point out that a Division Bench of this court in the case of *Tata Iron & Steel Co. Ltd. v. N.C. Upadhyaya* has pointed out that the circulars issued by the Board would be binding on the Income Tax Officer and must be given effect by this court. However, a note of caution was struck by the court by observing that the binding nature of circulars issued by the Central Board of Revenue must be confined to tax laws and that also for the purpose of giving administrative relief to the tax payer and not for the purpose of imposing a burden on him."

(v) *Union of India v. Elphinstone Spg. & Wvg. Mills Co. Ltd.* reported in 1978 (2)ELTJ680at.J684:

"The trade notices have no statutory effect. It is a matter of regret that senior officers of the Government should have put forward before the trade wrong interpretation of the Act, but that cannot be held to estop the appellants from canvassing the true interpretation of the statute."

(vi) *Oriental Paper Mills Ltd. v. Union of India* reported in 1978 (2) ELT J 382 :

"It is apparent from the judgment referred to above and numerous other decisions of this court delivered in respect of various taxation laws that the assessing authorities exercise quasi-judicial functions and they have duty cast on

them to act in a judicial and independent manner. If their judgment is controlled by the directions given by the Collector it cannot be said to be their independent judgment in any sense of the word. An appeal then to the Collector becomes an empty formality."

(vii) *Oriental Paper Mills Ltd. v. Union of India* reported in 1978 (2) ELT J 345 at J 349:

"It is obvious as well as admitted that both the Collector and the Central Government proceeded on the basis that the direction given by the Board was decisive of the matter. The revision applications filed before the Government were heard and decided by one of the members of the Board. He appears to have proceeded on the basis that in view of the directions given by the Board nothing more need be said as to the point in dispute. It is regrettable that when administrative officers are entrusted with quasi-judicial functions, often times they are unable to keep aside administrative considerations while discharging quasi-judicial functions. This court as well as the High Courts have repeatedly tried to impress upon them that their two functions are separate; while functioning as quasi-judicial officers they should not allow their judgments to be influenced by administrative considerations or by the instructions or directions given by their superiors. In this case both the Collector as well as the Central Government have ignored the line that demarcates their administrative duties and their judicial functions."

(viii) *Associated Film Industries Pvt. Limited Vs. D.R. Kohli and Others*,

"...these directions go to the root of the matter viz., that no discretion is left with the authority to consider the question on the facts of each case."

(ix) *Bhor Industries Limited Vs. Union of India*,

"[Counsel] commented that the adjudication proceedings before the central excise authorities are quasi-judicial in character and that the Assistant Collector cannot blindly rely upon the decision recorded at the Conference of Collectors and abdicate his judicial function. There is some substance in the comment...".

(x) *Rajan Ramkrishna v. Commissioner of Wealth-tax, Gujarat-I* reported in 1981 (127) ITR page 73 at....

"Thus, the legal position is that benevolent circulars are binding on all ITOs and WTOs, as the case may be, and on all the persons employed in the execution of the W.T. Act."

(xi) *Commissioner of Wealth Tax, Bombay City-II Vs. Gammon India P. Ltd.*,

"We may notice the objection on behalf of the revenue that the circular has been relied upon for the first time in this court and point out that the objection must be rejected in view of the decision of this court in *Navnitlal Ambalal and Others Vs. Commissioner of Income Tax, Bombay City II*, , where also the circulars were relied upon for the first time in this court in the course of hearing of a reference

under I.T. Act and yet it was given effect to because the view taken was that the circulars issued by the CBR are binding on the ITOs and must be given effect to by the court."

(xii) Mechanical Packing Industries Pvt. Limited Vs. C.L. Nangia and Others,

"It was fairly conceded by Mr. Dalai, learned Counsel for the respondents, that as the law stands, the Trade Notice had no statutory force and could not be relied upon. The order of the 2nd Respondent which is based upon the Trade Notice, therefore, falls."

(xiii) Addl. Commissioner of Income Tax, Delhi-I Vs. Mrs. Avtar Mohan Singh,

"Though the circulars of the Central Board are not binding on the court, yet, in general, circulars are binding on the income tax authorities. Through them, the Board cannot impose a burden on the tax-payer greater than what the statute provides but it can relax the rigour of the law. The Supreme Court has recognised the validity of beneficent circulars and the right of the tax payer to enforce these and get relief even in court - [Sec Ellerman Lines Ltd. Vs. Commissioner of Income Tax, West Bengal, Calcutta,

(xiv) Commissioner of Income Tax Vs. T.V. Ramanaiah and Sons,

"... decision of the Supreme Court set at rest any doubt as to the binding nature of the circulars issued by the Central Board of Direct Taxes so far as the officials of the Income Tax Department are concerned.

... Whenever the instructions given by the Central Board of Direct Taxes to relieve hardship to an assessee are violated and if such instructions are issued in exercise of the powers vested in the Central Board of Direct Taxes u/s 119 of the Act, it is certainly open to this court to compel the Income Tax Officer to follow the instructions of the Central Board of Direct Taxes. This is not to say that this court is bound by the instructions of the Central Board of Direct Taxes. All that is required to be said is that, so far as the officials of Income Tax Department are concerned, it is not open to them to say that they would not follow the instructions of the Central Board of Direct Taxes and carry matters in appeals and references. Indeed, we do not know whether the Commissioner of Income Tax, who carried this matter in reference to this court, is aware of the above-mentioned circular and, if so, why he thought it necessary to seek a reference on this point to this court when the matter is clearly governed by the circular of the Central Board of Direct Taxes."

(xv) Chjay Industries Pvt. Ltd. & Anr. v. Union of India reported in 3988 (34) ELT 42 at 47 :

"We, therefore, hold that the instructions or guidelines contained in the Board's telex Annexure being in the nature of administrative instructions, are not binding on the authorities performing quasi-judicial functions;...."

(xvi) Genest Engineers Pvt. Limited Vs. Union of India,

"It is clear from Section 37B that the Administrative orders, instructions and directions have to be observed by the excise authorities who are bound by such orders. Nevertheless the section has taken particular care to see that the authorities who will be acting as quasi-judicial authorities are protected from such type of directions or instructions. That is why the proviso mentioned above clearly makes it that the instructions, orders or directions cannot bind any Central Excise Officer by directing him to make a particular assessment or to dispose of a particular case in a particular manner."

(xvii) Commissioner of Income Tax Vs. Precision Steel and Engg. Works,

"The circulars issued by the Board are not binding on courts because if the assessee wants to challenge its correctness it is open to him to do so. But at the same time, the Supreme Court has held in numerous cases that the circular issued by the Board are binding on the Department, and the Department cannot be allowed to raise arguments opposed to the decision of the Board. In this case, we have to give effect to the circular referred to above, as it favours the assessee and would bind the Department."

17. The difference in the views expressed is more apparent than real. It is true that the Central Excise Officers are statutorily bound to abide by the instructions of the Board regarding classification if Section 37B is not to be reduced to a dead letter. At the same time it cannot be lost sight of that several decisions noted above have held that Central Excise Officers acting quasi-judicially must exercise their independent judgment.

18. In my view the principles that emerge from the aforesaid decisions read in the light of Section 37B of the Act are :

(1) There is a distinction between a decision in a particular assessment by a quasi-judicial authority and a decision on principle by the Board. While an instruction issued u/s 37B cannot be binding upon a quasi-judicial authority under the Act, the departmental officers conducting the lis before such quasi-judicial authority cannot take a stand contrary to the directive/instruction issued.

(2) The instructions which may be binding on the Central Excise Officers are not binding on the Assessee who may question the correctness of the same before a quasi-judicial authority and before a Court. Both the quasi-judicial authority and a fortiori, the Court, can question the correctness of the instructions.

(3) An assessee has on the other hand the right to claim and the court may compel compliance with such instructions as are for the benefit of the assessee by the Central Excise Officers.

19. Applying the aforesaid principles I am of the view that it is not open to the respondents to contend contrary to the circular that the yarn is classifiable under Sub-heading 5504.39 and not Sub-heading 5504.32 of the Schedule to the Act.

20. Furthermore the circular is clearly beneficial to the petitioners and the

petitioners have the right to claim enforcement of the same by the Central Excise Authorities.

21. A subsidiary point raised by the respondents in this connection needs to be dealt with separately. It is contended by the respondents that the instructions being administrative in nature cannot operate retrospectively. The respondents have relied upon the following decision in support of this contention :

S.B. Patwardhan and Another Vs. State of Maharashtra and Others, in which the Supreme Court observed : "These instructions, unlike rules regulating recruitment and conditions of service framed under the proviso to Article 309 of the Constitution or Section 241(2)(b) of the Government of India Act, 1935, cannot have any retrospective effect."

22. In my view the instructions regarding classification cannot be said to be such an instruction which required prospective implementation. The instruction is a decision on the doubt regarding the classification of the yarn. The decision clears the doubt. In effect the ambit of the relevant Sub-headings of the Schedule to the Act were construed with reference to the yarn. Such a decision is really classificatory. A classification results in a situation as if the Sub-heading as classified always was. Therefore this contention of the respondents must also be rejected.

23. It must be noted that the respondents have not challenged the circular.

II. Classification of the yarn.

24. In view of the finding on the first issue it is not necessary to determine this dispute separately. It is therefore also not necessary to decide the question of res judicata which was raised by the petitioners in this contention.

III. Scope of interference by the Court under Article 226 of the Constitution into questions of classification.

25. The dispute raised in the writ petition is not a question of classification simpliciter. The real dispute centred round the question of the application of Section 37B of the 1944 Act to the case. There is as such no question of fact involved. The respondents contend that the impugned orders were passed before the circular was issued and therefore the said orders cannot be set aside on that ground. As I have held that it is not open to the respondents to contend that the yarn was classifiable under Sub-heading 5504.39 of the Schedule to the Act before this court, it follows that it is also not open to the respondents to contend that the impugned orders, notices and demands are correct. There is no scope also for implementation of the impugned orders by the respondents contrary to the instructions of the Board.

26. In any event as the instructions were classificatory they relate back to the introduction of the Sub-heading itself. As the respondents cannot and indeed do not contend that the instructions are illegal, they must concede that the

impugned orders are incorrect and based on a misconstruction of the relevant Sub-headings. Even judicial decisions are considered in the light of subsequent decisions by higher judicial authorities and not on the state of the law which existed when the decision was rendered.

27. The matter therefore involves the determination of the jurisdiction of the respondents to act and is clearly covered by the observations in the cases cited by the parties which determine the right of the Court to interfere under Article 226 viz.

- (i) Collector of Customs v. Ganga Selly reported in AIR 1963 SC 1318.
- (ii) Hind Syntex Ltd. Vs. Union of India (UOI) and Others,
- (iii) Government of India Vs. English Electric Company of India Ltd., Madras,
- (iv) Union of India and Others Vs. T.S.R. and Co.,
- (v) Acme Metal Industries Pvt. Ltd. Vs. George Barla, Acce, Bombay,
- (vi) State of Uttar Pradesh and Others Vs. Maharaja Dharmander Prasad Singh and Others,
- (vii) Indoswe Engineers Private Limited Vs. Union of India,
- (viii) Satya Vijay Exports (P) Ltd. Vs. Collector of Customs,

28. Accordingly the writ application is allowed. The impugned notice dated 20-2-1990, orders dated 28-2-1990 and 30-8-1990 and demands raised on the basis thereof are set aside. The respondents are directed to act in accordance with the Circular No. 25/90 CX. 1 dated 26-11-1990 as far as the yarn manufactured by the petitioner company is concerned and to continue to classify the same under Sub-heading 5504.32 of the Schedule to the Act. There will be no order as to costs.

29. All parties to act on a signed copy of the operative part of the judgment on usual undertaking.