

(1998) 01 MAD CK 0069
In the Madras High Court
Case No : Writ Appeal No. 460 of 1993

Collector of Central Excise

APPELLANT

Vs

Sundaram Abex Ltd.

RESPONDENT

Date of Decision : 29-01-1998

Acts Referred:

Central Excise Rules, 1944 — Rule 173C
Central Excise Tariff Act, 1985 — Section 4
Central Excises and Salt Act, 1944 — Section 35A

Citation : (1998) 100 ELT 18

Hon'ble Judges : Shivaraj Patil, J;K. Gnanaprakasam, J

Bench : Division Bench

Advocate : K. Jayachandran, for the Appellant; C. Natarajan for and R. Raghavan, for the Respondent

Final Decision : Dismissed

Judgement

Shivaraj Patil, J.—This appeal is directed against the order dated 25-3-1992 made by the learned Single Judge in W.P. No. 2107 of 1989. Few facts leading to the filing of this appeal are the following :

In the course of this judgment we will refer to the parties as they were arrayed in the writ petition for convenience. The petitioner filed the writ petition to issue a writ of certiorarified mandamus to call for the records on the file of the second respondent in C. No. V/6806/15/20/88 Order 42/88, dated 21-12-1988 and to quash the same. The case of the petitioner as can be gathered from the affidavit filed in support of the writ petition is that the petitioner is a public limited company registered under the Indian Companies Act, 1956. It has its factory at Padi, Madras-50. It is carrying on business in the manufacture of Brake Linings and Clutch Facings for Automotive and non-automotive parts having technical collaboration with Abex Corporation of U.S.A. The products manufactured by the petitioner company fall within the purview of the tariff entry Item 34A of the First Schedule to the Central Excises and Salt Act, 1944 (For short "the Act"). Every

manufacturer of Excisable goods which attracts Excise Duty on the value is required to file under Rule 173C of the Central Excise Rules, a price list for the purpose of levying Excise Duty in the prescribed form for approval. Accordingly, the petitioner filed price list for approval declaring their Ex-factory wholesale prices that is list price less 33 per cent as the assessable value under Proviso (1) of Sub-section (a) of Section 4 of the Act. The Excise Authorities by letter dated 3-10-1979 informed the petitioner that the duty payable by the petitioner company be on the price at which the distributors of the company sell the products and, therefore, the price list shall be filed in Part 4 and not in Part 1 and accordingly, returned the price list. The petitioner filed price list under Part 4 under protest and requested the second respondent to give them a personal hearing to satisfy him that the duty payable will be only on their ex-factory price and not on the price charged by their dealers. The notices were issued as to why the dealers should not be treated as related persons and duty charged at the price at which the said dealers sold the products to others. In response to the notices, the petitioner submitted his explanation to the second respondent and requested him to file a price list under Part I. The second respondent by order dated 4-2-1981 dropped the show cause notice and directed that the assessable value will be based on the price at which the company sells the products to their wholesale dealers. The petitioner company has been charged duty accordingly. However, the first respondent by his order dated 28-7-1981 issued a show cause notice u/s 35A of the Act as to why the order of the second respondent should not be set aside and assessable value should not be approved in Part IV at the price at which the wholesale dealer deals the goods to their customers, i.e. less 25 per cent. The petitioner filed objections to the said notice on 21-8-1981 explaining how the petitioner company is selling the goods to all the dealers at common price and they were not concerned with the price at which the wholesale dealers were dealing in goods. The petitioner also explained orally to the first respondent with all the relevant decisions on 17-11-1981 through its counsel. The first respondent by his order dated 8-9-1982 set aside the order of the second respondent dated 4-2-1981 and held that the petitioner company should file the price list under Part 4 and the assessable value will be the list price minus 25 per cent Trade Discount allowed by the wholesale dealer of the petitioner and also directed the petitioner to pay the differential duty from the date of filing of the list under protest till date.

2. Aggrieved by the order of the first respondent, the petitioner filed W.P. No. 8026 of 1982 in this Court and the said writ petition was pending disposal. In W.M.P. No. 12006 of 1982 in W.P. No. 8026 of 1982 this Court passed an order on 28-7-1983 to the effect that it will be open to the Collector of Central Excise to assess the liability of the petitioner, but it will not be enforced until further orders of the Court. Accordingly, the petitioner had been allowed 33 per cent of list price as approved by the department. However, in order to protect their interest in the event of their failure in the writ petition, the petitioner collected deposits equivalent to the duty on the 8 per cent discount under dispute from

their dealers after informing them and on the basis of mutual agreement, with effect from 1-6-1981. It was made clear to the dealers that the deposit amounts so collected would be given back to them or paid to the Central Excise Department depending upon the outcome of the case. The fact of collection of such deposits from the dealers was also intimated by the petitioner to their jurisdictional Assistant Collector of Central Excise, Madras II Division stating that the deposit amount collected from the dealers would be paid to the Government or returned to the dealers on the basis of the outcome of the case.

3. In the year 1985, the petitioners started a second factory in T.S.K. Puram near Madurai in the jurisdiction of the second respondent, wherein the same goods i.e. brake linings were being manufactured. With effect from 28-2-1986, the first schedule to the Act was substituted by the Schedule to the Central Excise Tariff Act, 1985 and accordingly the brake linings were classified under the Tariff Heading [6806.10] of the said schedule. The rate of duty was 20 per cent ad valorem prior to 1-3-1987 and was increased to 25 per cent thereafter. The petitioner followed the similar procedure as it followed at Madras. However, the second respondent issued a show cause notice dated 16-9-1988 asking the petitioner to pay the Government the deposit collected as duty to the Government on the ground that in the course of verification of the invoices and debit notes raised from their Head Office at Padi, Madras by the Departmental Officers, it was noticed that the assessee had not passed on the 33 per cent discount as approved in Part I price list from time to time by the Assistant Collector of Central Excise, Virudhunagar, but they had passed only 25 per cent of the discount to the wholesale dealers and from the branches. The remaining 8 per cent discount amount was not passed on to the buyers, which was collected in the form of deposit through various invoices and debit notes retained by the assessee. Thus the assessee was liable to pay 8 per cent differential discount collected during the year 1985 to 1988 worked out to Rs. 59,54,556.13 and the Central Excise Duty amount collected in the form of deposit on the said discount value worked out to Rs. 13,25,616.59. The fact of non-passing of 8 per cent discount value as well as the duty collected on the value as deposit amount was not intimated to the Assistant Collector of Central Excise, Virudhunagar who had approved the price list. Under the circumstances, a show cause notice was issued on 16-9-1988 to the petitioner. The petitioner submitted his reply on various grounds. The second respondent by his order dated 21-12-1988 directed the petitioner to pay the entire sum of Rs. 13,25,616.59 collected as deposit on the ground that the amount of deposit collected is duty and is therefore, liable to pay the same to the Government. Under such circumstances the writ petition was filed for the reliefs as stated above directly in this Court although appeal provision was available to the petitioner since the order impugned in the writ petition was basically without jurisdiction and contrary to the order passed by this Court in the earlier writ petition.

4. The respondents filed the counter-affidavit resisting the claim of the petitioner and justifying the impugned order giving the details of the provisions of the Act.

5. Learned Single Judge after hearing both the parties and having regard to the order dated 28-7-1993 passed in W.P. No. 8026 of 1982 accepted the case of the petitioner and quashed the impugned order in the writ petition. Thus the respondents are the appellants before us challenging the said order of the learned Single Judge.

6. Shri K. Jayachandran, learned Additional Central Government Standing Counsel, principally contended that non-passing of 8% discount value as well as the duty collected on the value as deposit amount not intimated to the Assistant Collector of Central Excise, Virudhunagar, who had approved the price list, made all the difference when compared to the Madras unit of the respondent; the case in regard to Madras unit was considered in W.P. No. 8026 of 1982 and the case was remanded. The Collector, Central Excise, Madras, after the order of remand dated 30-3-1990 made in the said writ petition, having considered all aspects dropped the proceedings initiated in similar show cause notice, but the same benefit could not have been extended in the present Writ Petition 2107/89 for the reason that the Assistant Collector of Central Excise, Virudhunagar had not been intimated the fact of non-passing of 8% discount value as well as the duty collected on the value as deposit amount. The learned Counsel also made elaborate submissions referring to various provisions of the Act to say that powers were properly exercised u/s 11A of the Act.

7. On the other hand Shri C. Natarajan, learned Senior Counsel argued supporting the order under appeal. He submitted that Section 11A is not at all attracted to the facts of the present case as there was no short claim. In support of this submission he also placed reliance on few decisions.

8. We have considered the submissions made by the learned Counsel for the parties.

9. It is not disputed before us that the writ petitioner had filed W.P. No. 8026/82 on identical facts in regard to its Madras Unit which was allowed on 30-3-1990, as indicated in paragraph 3 of the order of the learned Single Judge, and the case was remitted to the first respondent, who after examining all aspects, dropped the proceedings initiated. The learned Single Judge referring to the order made in W.P. No. 8026/82 and the order made by the first respondent after remand of the case, in the said writ petition, ordered the present Writ Petition 2107/89.

10. Merely because the fact of non-passing of 8% of discount value as well as the duty collected on the value as deposit amount was not intimated to the Assistant Collector of Central Excise, Virudhunagar, in our view, it did not make any difference when the facts were identical in respect of the unit of the writ petitioner at Madras and at T.S.K. Puram near Madurai. Under the circumstances, the learned Single Judge, in our view, was right in ordering the writ petition.

11. We do not find any good or valid ground to interfere with the order of the learned Single Judge. In this view we have taken, we consider it unnecessary to

refer to the various other submissions made by the learned Counsel for the parties including as to the applicability of Section 11A of the Act to the facts of the present case.

12. In the result, for the reasons stated, this writ appeal is devoid of any merit. It is liable to be dismissed, and accordingly it is dismissed.