(1985) 07 DEL CK 0027

In the Delhi High Court

Case No : Civil Writ Petition No. 230 of 1973

Commercial Refrigeration Corporation APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 24-07-1985

Acts Referred:

Citation : (1989) 42 ELT 534

Hon'ble Judges : Sunanda Bhandare, J

Bench : Single Bench

Judgement

Sunanda Bhandare, J.—The petitioner firm carries on the business of manufacture of Refrigeration equipment. On 7th January, 1966 the petitioner sold one Beverage Cooler Cabinet with electric motor to M/s. Ashok Stores, Kamala Nagar, Delhi for a sum of Rs. 1,078/- including excise, special duty and sales-tax. On the same day the petitioner sold to the same party one imported Bitzer Unit No. D230-G and electric motor single phase of 220 volts AC for a sum of Rs. 1,546.25. This amount also included sales-tax. These goods were cleared from the factory of the petitioner firm in the presence of the Inspector of Central Excise on payment of appropriate excise duty after filling the prescribed AR 1 from. On 22nd May, 1969 i.e. after a period of about three years respondent No. 2 issued a notice under Rule 9 of the Central Excise Rules, 1944 (hereinafter referred to as the Rules) alleging that the petitioner firm had sold one Beverage Cooler compete with condensing Unit and electric motor from their license premises without payment of Central Excise duty livable thereon. The notice directed the petitioner firm to show cause as to why the goods mentioned in the said notice should not be confiscated under Rule 9(1) of the Rules and further why duty livable should not be demanded under Rule 9(2) of the Rules. The petitioner replied to this show cause notice and denied that there was any contravention of Rule 9(1) of the Rules. The petitioner firm informed the respondents that the goods cleared by the petitioner were duly accounted for in the statutory accounts and were cleared from the factory on payment of appropriate duty. On 17th July, 1969 the Assistant Collector of Central Excise (respondent No. 3) gave a personal hearing to the petitioner and after the written reply was filed by the petitioner firm passed an order on 16th December, 1969 holding that the petitioner was guilty of contravention of Rule 9(1) and imposed a penalty of Rs. 200/- and also demanded Central Excise duty on the net disposal value of the goods which was Rs. 4,400/-. The petitioner firm preferred an appeal against this order of the Assistant Collector of Central Excise which was rejected by the Collector of Central Excise (respondent No. 4) vide order dated 15th July, 1970. The petitioner firm thereafter filed a revision petition u/s 36 of the Central Excise and Salt Act, 1944 before respondent No. 5 which was also rejected on 16th August, 1972. The petitioner has challenged these three orders dated 16th December, 1969, 15th July, 1970 and 16th August, 1970 passed by respondents No. 3, 4 and 5 respectively and notice dated 22nd May, 1969 issued by respondent No. 2 in this writ petition under Article 226 of the Constitution of India.

2. It was contended by the learned Counsel for the petitioner that if there was short levy of excise duty the respondent could issue notice only under Rule 10 of the Central Excise Rules, 1944 (hereinafter referred to as the Rules). It was contended that the goods in question were cleared after duly submitting AR 1 from and obtaining the Gate Pass from the Excise Inspector in charge of the petitioners'' factory and Rule 9 of the Rules would be applicable only if there had been clandestine removal of excisable goods and not otherwise. Learned Counsel further contended that the two receipts were issued for the goods which could be used by the customers independently. The learned Counsel relied on N.B. Sanjana, Assistant Collector of Central Excise, Bombay and Others Vs. The Elphinstone Spinning and Weaving Mills Company Ltd., and the judgment of the court in C.W. 1310/70 Sukh Ram & Sons v. Union of India and Others decided on 25th August, 1971 in support of his contentions.

3. Though on one appeared for the respondents at the time of the hearing of the case, a return has been filed where in it has been averred by the respondents that the notice was rightly issued under Rule 9 of the Rules because the petitioners supplies complete unit of Beverage Cooler to M/s. Ashok Stores against a contract value of Rs. 4400/- and not only a Beverage Cooler Cabinet with electric motor as contended by the petitioner. In the return the respondents have relied on the contract entered into between the petitioners and M/s. Ashok Stores. It has not been denied in the return that the Excise Inspector cleared the goods and made the endorsement on the AR 1 form but it is disputed that Excise Inspector was present at the factory site when the goods were cleared.

4. In order to attract Rule 9(2) the excisable goods must be removed clandestinely. In respect of the first bill of Rs. 1,078/- the excise duty was charged but it was short levied. In respect of the second bill (Annexure P2) no excise duty was charged because the Excise Inspector felt that the goods cleared were not chargeable to excise duty. The Supreme Court in N. B. Sanjana''s (supra) case has held that Rule 9(2) cannot apply to removal of duties not livable

or not paid or short levied or not paid in full or erroneously refunded. In order to recover duties which are erroneously refunded or not levied or short levied or not paid the notice has to be issued on the person chargeable with the duty within six months from the relevant date. In the present case, the goods were cleared on 7th January, 1966 and the notice was issued on 22nd May, 1969. Assuming that the notice was under Rule 10 even then since it was issued after a period of three years it was clearly beyond time.

5. In my view, Therefore, the notice dated 22nd May, 1969 under Rule 9(2) the Rules were illegal and Therefore has to be quashed. The writ petition is allowed. There will be no order as to costs.