
(1988) 08 DEL CK 0014

In the Delhi High Court

Case No : Civil Writ Petition No. 1708 of 1987

Duncans Agro Industries Ltd.

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 12-08-1988

Acts Referred:

Citation : (1988) 19 ECR 1 : (1989) 39 ELT 511

Hon'ble Judges : S.S. Chadha, J;S.N. Sapra, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Shri S.S. Chadha, J.—The petitioner in this petition has raised, in addition to the grounds of challenge as are in C.W.P. 1039/87, "M/s. Duncons Agro Industries Ltd. v. Union of India and Others", a further ground with regard to show cause notice dated October 1, 1986 issued to the petitioner alleging contravention by the petitioner of Central Excise Rules, 9(1), 52, 52A, 53 and 226 for evading payment of Central excise duty in respect of cigarettes manufactured and cleared from the factory at Agarpara during the period September, 1981 to February, 1983 and also addendum to the show cause notice dated October 3, 1986. The grievance is that these show cause notices are in excess of the jurisdiction and/or without authority of law inasmuch as the petitioner had been paying excise duty on the basis of the provisional assessments pursuant to filing of provisional price lists and there is yet no finalisation of the provisional assessments.

2. According to the counsel, Section 11A of the Central Excises and Salt Act, 1944 (hereinafter called the Act) cannot be invoked in those cases where duties are paid under provisional assessment made under Rule 9B of the Central Excise Rules, 1944 (hereinafter called the Rules) without first finalising the assessment. Provisional assessment is not an assessment at all but is merely a provision for payment of some amount by way of Central excise duty pending the determination of the assessable value after taking into consideration all the elements including additions and deductions. There cannot be any non-levy or

non-payment or short levy or short payment of Central excise duty unless there is a final determination of the assessable value. It is urged that Section 11A applies to re-opening of assessment for recovery of duty which has escaped assessment and is hence inapplicable unless the particular assessment has been completed in accordance with law. Reliance is placed on *International Computers Indian Manufacturers Ltd. and another Vs. Union of India and others*, *Binny Limited Vs. Superintendent, Central Excise and Others*, *Andhra Re-rolling Works, Hyderabad Vs. Union of India (UOI) and Others*, .

3. Our attention is also invited to a specimen provisional assessment in the prescribed proforma for determination of value u/s 4 of the Act (page 141 of the Court record) and the one filed by the Addl. Solicitor General during the hearing. The contention is that the assessment is provisional in all respects as there is no provision for partial provisional assessment either in the Act or in the rules. The assessable value cannot be finally computer except after finalising "post manufacturing expenses" allowed to be deducted.

4. Another face of the same submission is that the cause of action for invoking Section 11A of the Act would accrue only from the relevant date defined u/s 11A which in case of provisional assessment means the date of adjustment of duty after final assessment under Rule 9B. It is also contended that serious prejudice would be caused as the reward scheme would operate, as a result of which the likelihood of bias would arise.

5. For the reasons recorded in C.W.P. 1039/87, "*M/s. Duncons Agro Industries Ltd. v. Union of India and Others*", we repel the common contentions.

6. We are, however, not inclined to express any considered opinion on the additional contentions. It is not disputed by the Revenue that the provisional assessment have been made on the basis of provisional price lists submitted by the petitioner. This was in pursuance of the Orders of the Calcutta High Court. Subsequently, in pursuance of the Orders of the Calcutta High Court, the petitioner submitted a number of revised price lists for the period from November 1, 1981 to February 28, 1983. In all the price lists, they claimed for the whole- sale price deductions on accounts of the cost of transportation, deduction of tariff rate of duty freight, insurance on freight, rebate octroi and interest on receivables at various percentages etc. for determining the assessable value. Certain proceedings are going on before the adjudicating authorities and the case is under process of adjudication. The case of the department, however, is that the impugned show cause notices do not concern itself which the subject matter of the provisional assessments and that the show cause notices have been issued relating to the matter of fraudulent activities of the petitioner with intent to evade payment of correct excise duty which is due.

7. The impugned show cause notice covers detailed allegations in the statement of facts enclosed with it as to how the petitioner has contravened the provisions of Rules 9(1), 52, 52A, 53 and 226 of the Rules and how they willfully

misdeclared assessable value of cigarettes from time to time or how they used various named companies for collecting from the whole-sale buyers of their cigarettes, additional and extra amounts over and above the value of the cigarettes shown in the invoices, which were liable to be included in the assessable value or how they have controlled, directed and monitored the recovery of extra amounts etc.

8. There is no inherent lack of jurisdiction on these allegations. Section 11A of the Act says that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud, collusion, or any willful mis-statement or suppression of facts, or contravention of any of the provisions of the Act, or the rules made there under with intent to evade payment of duty, then show cause notice can be issued to the person chargeable with duty and consequently recoveries made. The Court can look to the circumstances in which the law came to be passed. We have referred to the provisions of Rules 10, 10A and later its incorporation as Section 11A in the main judgment. The intention of the legislature is to deal with fraudulent evasion of the excise duty in the manner provided therein. There are allegations of a fraudulent evasion of the excise duty, besides the allegations made are that the petitioner never submitted to assessment in regard to various components going in the determination of assessable value with respect to goods on which duty has been evaded. Those excisable goods were never tendered for provisional assessment with the totality of the elements which go to make up the value for payment of excise duty. The applications for removal have been made from time to time. A provisional assessment could be with regard to the tariff classification or price in the trade or cost of packing or post-manufacturing costs. The case of the department is that the subject matter of the provisional assessment relates to "post-manufacturing cost" and to no other item, and this is borne from the ARI, (Application for removal on provisional assessment) and the bond which contains the area of provisional assessment. There are allegations in the show cause notices as to how the petitioner has misdeclared the assessable values of cigarettes from time to time, prima facie, unrelated to the disputed elements of "post-manufacturing cost" in the controversy before the Calcutta High Court. The provisional assessments and the consequential execution of the bonds could not allow insulation against misrepresentation or fraud or collusion and the consequential evasion of the excise duty in respect of various components or elements not at all offered for calculation of the assessable value. Some of the elements may be overlapping, we do not know and, Therefore, have to leave them for investigation and adjudication by the authorities under the Act. May be the provisional assessment is final in respect of some components and others which are the subject matter of the dispute before the Calcutta High Court or as a consequence of the judgments of the Supreme Court in *Union of India & Ors. v. Bombay Tyres International Ltd. etc.*, (1983) 14 E.L.T. 1896 ECR C 663 and *Assistant Collector of Central Excise and Others Vs. Madras Rubber Factory Ltd.*, are to be reopened. It is for these reasons that we leave its determination with

the adjudicating authorities, one relating to the finalisation of the provisional assessments and the other relating to the evasion of the excise duty as detailed in the impugned show cause notices.

9. There is also no merit in the submission that the cause of action for invoking Section 11A of the Act would accrue only on the "relevant date" defined u/s 11A which in case of provisional assessment means the date of adjustment of duty after final assessment under Rule 9B. Section 11A was inserted by Section 21 of the Amendment Act No. 25 of 1978 with effect from November 17, 1980. It is substitution of Rule 10 of the Rules which was omitted with effect from November 17, 1980. Rules 10 and 10A (operative prior to August 6, 1977) also provided for recovery of duties and charges short-levied or erroneously refunded. The period of issue of show cause notice was only three months and it could be issued by the Assistant Collector, Central Excise. Rule 10 which was operative from August 6, 1977 to November 16, 1980 provided a period of six months and the show cause notice could be issued by the proper officer. It was also provided that in cases where any duty had not been levied or paid, or had been short-levied or had not been paid by reason of fraud, collusion or any willful mis-statement or suppression of facts by such person or erroneously refunded etc. the period was five years instead of six months. Section 11-A was inserted by Amendment Act No. 25 of 1978 and came into force on the appointed date i.e. November 17, 1980. Further amendments were made in 1985, the words "as if" for the words "Central Excise Officer" the words "Collector of Central Excise" were substituted in the proviso to Section 11A(1) after the words "as if". In sub-section (2) of Section 1A for the words "the Assistant Collector of Central Excise" the words "the Assistant Collector for Central Excise or, as the case may be, the Collector of Central Excise" were substituted. Prior to the amendment of 1985 the initiation of the proceedings by issue of show cause notice could be by any Central Excise Officer but the determination had to be by the Assistant Collector of Central Excise. The result of the amendment is that the excise duty short-levied or short-paid or erroneously refunded by reason of fraud, collusion or any willful mis-statement or suppression of facts or contravention of any of the provisions of the Act or the Rules with intent to evade payment of duty could be the subject matter of proceedings for levy and collection. These provisions show that Rules 10 and 10A as originally enacted did not create a right to levy the excise duty. It merely laid down a rule of limitation. The statute of limitation assumes the existence of a cause of action and does not define it or create one (See R.C. Jall Vs. Union of India (UOI),). The intention of the law of limitation is, not to give a right where there is none, but to interpose a bar after a certain period to enforce an existing right (See "Hari Nath Chatterjee v. Mothur Mohan Goswami", ILR 20 Cal 8 . The cause of action for invoking the provisions of Section 11A is the fraudulent evasion of excise duty and not a right created by any provision relating to limitation.

10. For the above reasons, the writ petitions fails and is dismissed with no order as to costs.