
(1990) 03 CAL CK 0057
In the Calcutta High Court
Case No : Matter No. 480 of 1987

East Anglia Plastics (I) Ltd.

APPELLANT

Vs

Assistant Collector of Customs

RESPONDENT

Date of Decision : 19-03-1990

Acts Referred:

Constitution of India, 1950 — Article 123, 265, 266
Customs Act, 1962 — Section 27
Customs Tariff Act, 1975 — Section 3
Limitation Act, 1963 — Article 123

Citation : (1990) 50 ELT 508

Hon'ble Judges : Ajit K. Sengupta, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Ajit K. Sengupta, J.—In this application under Article 226 of the Constitution of India, the petitioners have prayed for a direction upon the concerned respondent authorities for considering the refund applications contained in Annexure "C" to the writ petition and to grant refund of the countervailing/additional duty of Customs which, according to them, wrongfully and illegally realised.

2. They have also asked for interest on the refund to be made by the respondents.

3. The case of the petitioners, shortly stated, is that the (first petitioner) petitioner company is the manufacturer of, inter alia, Phthalate plasticizers and for this it requires raw materials such as Industrial alcohol known as 2-Ethyl Hexanol, Iso-Butanol and Iso-Octanol (hereinafter referred to as the said goods). During the period from March, 1979 to February, 1985, the petitioner company imported a number of consignments of the said goods through the Calcutta Port. The petitioner company duly paid the necessary basic and/or auxiliary duties of customs payable in respect of the said consignments of the said goods before obtaining clearance thereof from the respondent authorities. As the petitioners

were unaware of the provisions of law, they paid in respect of the said goods additional duty or countervailing duty u/s 3 of the Customs Tariff Act to the tune of Rs. 25,34,965.03 wrongfully demanded by the respondents.

4. In or about January, 1985, the petition came to know from a circular dated 1st October, 1984 issued by the Central Board of Excise and Customs that no countervailing/additional duty was/is payable on alcohol treating the same as falling under Tariff Item 68 of the erstwhile Central Excise Tariff. On 9th April, 1985, the petitioner applied to the Assistant Collector of Customs, respondent No. 1 for refund of additional or countervailing duty paid by them with regard to the import of goods during March, 1979 to February, 1985 due to mistake. The respondent No. 1 neither processed the said applications nor order refund to be paid to the petitioners on the said applications till date.

5. The respondents, however, in their affidavit-in-opposition stated that alcohol in trade parlance is commonly known as ethyl alcohol in the absence of any definition in the Central Excise Tariff. Accordingly, ethyl alcohol was excluded from the ambit of Item 68 of the Central Excise Tariff for the levy of duty and all other organic compounds like 2-Ethyl Hexanol, Butanol etc. were levied to duty as chemicals not elsewhere specified in terms of Item 68 of the said Central Excise Tariff. This levy was made on the basis of the understanding and acceptance of all concerned including the tax and/or duty payer in good faith. Accordingly the respondents contended that till it became known i.e. on 1st October, 1984 that those organic compounds having alcoholic functioning group are also technologically alcohols, the levy of additional duty of Customs on those organic compounds was not beyond jurisdiction and was well within the ambit of Item 68 of the Central Excise Tariff which included "all other goods not elsewhere specified". The respondents further stated that pursuant to the said Circular of the Board additional duty on Item 68 of the Central Excise Tariff has not been levied. According to them, duty was leviable as chemicals under Item 68 of the Central Excise Tariff on the goods imported by the petitioners prior to issue of the said circular on the basis of the then prevalent interpretation of alcohol which covered only ethyl alcohol and was accepted by all concerned including the tax payers all over the country and as such refund applications filed within the time limit as prescribed u/s 27 of the Customs Act are only eligible for consideration of refund of duty in terms of the said circular.

6. It appears that when the present application was first moved before this Court, Bhagwati Prasad Banerjee, J. directed the customs authorities to dispose of the refund applications by 31st July, 1987 and pass necessary orders by 14th August, 1987. The Assistant Collector of Customs, respondent No. 1 by his order dated 10th August 1987 disposed of the said application in rejecting claims of refund against 131 bills allowing claims against 3 bills of entry.

7. 11 applications made in respect of 131 Bills of Entry for refund were rejected by the Assistant Collector of Customs on the ground that these applications were barred by limitation. He however, allowed the claims against 3 Bills of Entry,

where he has held as follows:

"Regarding claims for refund against three Bills of Entry viz. (1) 1-519 of 17-10-1984, 1-508 of 16-11-1984 and 1-612 of 14-2-1985, I find that claims for refund against them were lodged in time in the office of the Asstt. Collector of Customs, Appraising Group I and the products of alcohol imported under them, were not leviable to countervailing duty equal to Central Excise duty under T.I. 68 CET. I accordingly admit claims for refund of countervailing duty equal to Central Excise duty collected under T.I. 68 CET on these three Bills of Entry and orders that payment of refund against these three Bills of Entry have to be processed forthwith."

8. From the said order it would be evident that products of alcohol imported at the material time were not leviable to countervailing duty equal to Central Excise duty under T.I. No. 68 of CET. It will, therefore, be clear that there were no dispute that no countervailing duty was leviable in this case and accordingly the imposition of the countervailing duty equal to Central Excise duty was unauthorised and illegal.

9. The question whether the respondents were justified in rejecting the application for refund essentially depends on the question whether such levy was illegal or not. I have already stated the case of the respondents made out in their affidavit-in-opposition. According to the respondents any assessment made levying duty on the subject goods under Item 68 of the said Central Excise Tariff as chemical was well within the law and was not illegal. It is a matter of interpretation which might change with the advancement of technology. However if any levy is made on the basis of an interpretation which is accepted by all concerned the same is not illegal. As stated, the respondents in their affidavit-in-opposition stated that duty was leviable as chemicals under Item 68 of the Central Excise Tariff on the goods imported by the petitioners prior to issue of the said circular on the basis of the then prevalent interpretation of alcohol which covered only ethyl alcohol and was accepted by all concerned including the tax payers all over the country and as such refund applications filed within this time limit as prescribed u/s 27 of the Customs Act are only eligible for consideration of .refund of duty in terms of the said circular.

10. There is no dispute that alcoholic products assessed under the concerned bills of entry are covered by the expression "alcohol" including alcoholic liquors for human consumption. These products are excluded from the levy of Central Excise duty as well as countervailing duty under sub-heading (a) of Tariff Heading 68 of CET.

11. The Circular dated 1st October, 1984 issued by the Central Board of Excise and Customs considered the question in the light of the opinion of the Law Ministry and the decision of the Appellate Tribunal. The view was that when a Statute says the certain words shall include certain things, the intention is to give more extensive meaning to the words. In other words, the words "including

alcoholic liquors for human consumption" are not intended to exclude alcoholic liquors in other form. Therefore, alcohol in any form is excluded from Tariff Item 68.

12. Accordingly it was decided by the Board that "Alcohol-all sorts", excluded from the scope of T.I. 68, refers to alcohols of all kinds whether potable or otherwise.

13. Thus the levy of Central Excise duty on these goods were basically wrong and these being the unauthorised levy of tax, the respondents were and are under an obligation to refund such tax realised illegally. This issue as indicated, was examined by the Central Board of Excise and Customs which by the Circular dated 1st October, 1984 made it quite clear that the prevailing Tariff heading under T.I. 68 of CET did not authorise collection and levy of Central Excise duty on these products.

14. Under Article 265 of the Constitution of India, no tax can be levied or collected except by the authority of law. There cannot be any dispute that the duty was levied in this case by common mistake. In the premises, the respondents cannot deny refund of the duty thus realised on the plea of limitation u/s 27 of the Customs Act, 1962. In a case like this where the initial levy is without jurisdiction and illegal, limitation under the Customs Act will not be applicable. If the limitation as prescribed by general law i.e. Limitation Act is taken into account under Article 123 .of the Limitation Act, 1963, in that event time limit for claiming refund of any dues would be three years from the date when the cause of action arose. In other words, cause of action would arise only when the claimants had the knowledge that the levy was illegal and refund is due to them.

15. From the averments made in the petition it would be evident that the petitioner became aware only in January, 1985 that the duty which was levied is without any authority of law and is refundable to them. This knowledge came to them only after the circular dated 1st October, 1984 was issued by the Central Board of Excise and Customs. Immediately, thereafter, they claimed refund from the Department on 10th April 1985, 22nd May, 23rd May and 24th May, 1985.

16. Apart from the fact that the respondents cannot take the plea of limitation, they have acted without any jurisdiction in collecting the duty. Even if Article 123 of the Limitation Act is to be taken to govern the present claim, in that event, none of the 131 applications is barred by limitation. This question came up before me for consideration in Dilichand Shreelal Vs. Collector of Central Excise and Others, while after considering the Division Bench decision of this Court as well as several decisions of the Supreme Court and other High Courts it was held that the duty paid under mistake of law must be held to be illegal and unauthorised and the assessee is entitled to refund. There, it was held then Article 265 of the Constitution provides that no tax shall be levied or collected except by authority of law. In that case the authorities collected the duty by not

complying with the exemption notifications issued by the Central Government which governed the case of the petitioner. If the imposition or collection of duty is illegal and in contravention of Article 265, then acquiescence cannot take away from a party the relief he is entitled to, nor does payment of illegal duty create estoppel against his subsequent challenge.

17. It has been consistently held by the High Courts and the Supreme Court that if the collection is without jurisdiction then the plea of unjust enrichment cannot be advanced to deprive the persons who paid duty under mistake of law or otherwise. The refund claim cannot be rejected on the ground that the manufacturer had no intention to refund the same or on the ground of unjust enrichment. In the case of D. Cawasji and Co. it was held that there is no provision under which the Court could deny refund of tax even if a person who collected it from a customer and has no subsisting liability or intention to refund it to them or for any reason, it is impracticable to do so. If duty is collected without authority of law, the Department cannot retain the excess duty and the petitioner has a corresponding legal right to recover it. In the instant case the duty was collected without authority of law, the petitioner was entitled to amounts collected by the respondents.

18. If the tax is levied by mistake of law, it is ordinarily the duty of the State, subject to any provision of law relating to such tax, to refund the tax. If refund is not made remedy through Court is open, subject to the same restriction and also to the bar of limitation under Article 123 of the Limitation Act, namely three years.

19. In my view the writ court has jurisdiction to grant relief notwithstanding procedure prescribed by the Act. The order passed by the Departmental authorities are not administrative orders. The orders passed in this case by the Assistant Collector rejecting the claim of the refund are quasi-judicial order and their validity can be challenged in the writ application. When the collection of levy is in violation of Article 265 of the Constitution, it has consistently been held by the Courts that the authorities cannot retain such money illegally realised. Accordingly, the petitioner can, in a writ application ask for return of the money collected by way of duty or otherwise without any authority of law and in contravention of Article 265 of the Constitution. Therefore, it cannot be contended that in view of specific provision for refund in section of the Customs Act, Writ petition is not entertainable under Article 226 of the Constitution.

20. It is true that under the provisions of the Customs Act, the period of limitation has been prescribed for preferring the claim for refund. Law of limitation will not ordinarily govern such claim. However, this principle will not apply when duty has been collected unlawfully.

21. The contention that in a writ application generally refund is not ordered and the party is relegated to a suit is not tenable. It has nowhere been laid down that the High Court is powerless in appropriate case to direct refund under Article 226

of the Constitution, if such refund is otherwise due to the assessee. On the facts of the case, the petitioner is entitled to the relief inasmuch as it has not been disputed that the duty was collected unlawfully whether it was by mistake or otherwise. The ground on which refund was rejected was that it was barred by limitation under the statute. It was not rejected on the ground that the petitioner was not entitled to refund on merits. The extraordinary remedy under Article 226 of the Constitution is available on the facts of this case and the question of relegating the petitioner to civil suit does not arise.

22. The contention that the decision of the Assistant Collector is noberroneous, found that the petitioner did not fulfil the conditions of refund. The refund was rejected on the ground that it was barred by limitation. In a sense, the question of limitation is a question which pertains to the jurisdiction of the concerned officer. But, since it was erroneously held that the refund claim is barred by limitation, it is an error of law pertaining to the jurisdiction of the High Court which can be corrected under Article 226 of the Constitution. From the date when the duty becomes known to the person who has made the payment by mistake. The petitioner became aware only in January 1985 that the duty which was levied was without any authority of law and it is refundable to them. This knowledge came to them only after the Circular dated 1st October, 1984 was issued by the Central Board of Excise and Customs. Immediately, thereafter they claimed refund from the department on 10th April 1985, 22nd May, 23rd May and 24th May, 1985. Accordingly the applications for refund cannot be held to be barred by limitation.

23. Under the Customs Law, one has to clear the goods imported upon payment of duty as levied unless it is known to him that the duty is not exigible. Only when it become known to him that duty is not leviable, he can then clear the goods under protest. The question, therefore, of making any payment under protest did not arise before the said Circular dated 1st October, 1984 was issued. Parties proceeded on the footing that such duty was payable. When the impost is illegal, it is immaterial whether payment pursuant to such impost was made under protest or not.

24. The view I have taken is supported by several decisions viz. Ruby Mills and another Vs. Union of India and others, ; Industrial Cables (India) Ltd. Vs. Union of India and others, ; Autometers Ltd. and another Vs. Union of India and others, ; L.D. Textile Industries Ltd. and others Vs. Union of India and others, ; Kumar Prabhulal Shah and others Vs. Union of India and others, ; Rapidur (India) Ltd. Vs. Union of India and another, and Raman Kantilal Bhandari Vs. Union of India and others,

26. For the reasons aforesaid it must be held that the Assistant Collector of Customs acted contrary to law in rejecting the claim of refund in respect of 131 bills of entry.

27. The next question is whether the petitioners are entitled to any interest on

the amount of the outstanding refund which was not granted to them on the plea of limitation. Inasmuch as the imposition is illegal and the respondents were not being entitled to recover from the petitioners the duty covered by the 131 Bills of Entry, the respondents cannot withhold the amount of refund. The respondents have made use of the money which otherwise the petitioners would have enjoyed, had the duties not been collected contrary to law and accordingly the respondents have to compensate for the user of such money. Interest is the compensation for the use of and/or detention of money and accordingly the respondents shall refund the amount of duty in respect of 131 Bills of Entry at the rate of 10% from the date when their applications for refund were rejected by the Assistant Collector of Customs until the date of payment.

28. In the premises aforesaid, this application is allowed. The rule is made absolute. The impugned order of the Assistant Collector of Customs in so far as it relates to the rejection of refund applications in respect of 131 Bills of entry, is set aside. The respondents are directed to re-process the applications in respect of the 131 Bills of Entry within a week from date and grant refund within two weeks thereafter with interest as specified above.

29. Mr. Roy Chowdhury, learned Counsel appearing for the respondents, prayed for stay of the operation of the judgment and order. After hearing the learned counsel for the parties stay is granted on condition that the entire amount of refund due with interest in terms of this order shall be deposited in a fixed deposit account in the name of the Collector of Customs. The fixed deposit receipt shall be retained by him subject to any order that may be passed in the appeal, if any, preferred by the respondents against this judgment and order. Such deposit shall be made on or before the 15th of April 1990. In any event, there will be an unconditional stay until the 15th of April 1990.

30. All parties shall act on a signed copy of the minutes of the operative part of the judgment and order upon usual undertaking.