(2004) 09 GUJ CK 0042

In the Gujarat High Court

Case No : Special Civil Application No. 3139 of 1986

Escol Electromech Ltd. APPELLANT

Vs

Union of India (UOI) RESPONDENT

Date of Decision : 01-09-2004

Acts Referred:

Central Excise Rules, 1944 — Rule 173B
Central Excises and Salt Act, 1944 — Section 11A, 11A(1)
Constitution of India, 1950 — Article 226

Citation : (2004) 09 GUJ CK 0042

Hon'ble Judges : M.S. Shah, J;D.A. Mehta, J

Bench : Division Bench

Advocate : Rakesh Gupta, for Trivedi and Gupta, for Petitioner Nos. 1-2, for the Appellant; M. Iqbal Shaikh, for Respondent Nos. 1-4, for the Respondent

Final Decision : Allowed

Judgement

M.S. Shah, J.—This petition under Article 226 of the Constitution challenges the order dated 16.5.1986 (Annexure "M") passed by the Assistant Collector of Central Excise & Customs, Division-II, Baroda ordering that the product "Time Punching Clocks" manufactured by the petitioner-Company and cleared during the period from June 1985 to February 1986 on payment of excise duty at the rate of 10% ad-valorem under the then Tariff Item No.44 is classifiable under Tariff Item No.33D as it existed then and liable to duty under the said Item No.33D. The Assistant Collector also ordered that the petitioner shall accordingly pay the excise duty on the Time punching clocks valued at Rs.18,04,920/- cleared during June 1985 to November 1985 at appropriate rate under Tariff Item No.33D as also the duty of excise amounting to Rs.1,43,760/- being the differential duty at 10% ad-valorem (20% - 10% ad-valorem) on the "Time Punching clocks" cleared during the period 1.12.1985 to 28.2.1986 as demanded by the Superintendent of Central Excise, Baroda vide his show cause notice dated 18.3.1986 u/s 11-A(1) of the Central Excise and Salt Act, 1944.

2. Initially, on 5.2.1987 this Court had granted ad-interim stay of operation of the impugned order dated 16.5.1986 on condition that the petitioner executes a personal bond undertaking to make good the difference in the excise duty in case the petitioner fails in this petition. After the petition was admitted, the Court passed the following interim order on 11.11.1987:-

"Ad-interim relief is made absolute on condition that the petitioners furnish security in immovable property to the satisfaction of the Assistant Collector of Central Excise, Division-II, Baroda for a sum of Rs.3,24,252/- within three weeks from this date."

It appears that thereafter the petitioner-Company and its Managing Director filed Civil Application No.699 of 1992 stating that though the security in immovable property of the petitioner-Company was given in compliance with the aforesaid order, since the petitioners were desirous of disposing of the concerned Unit of the petitioner-Company and to transfer its assets and liabilities, the petitioners may be permitted to furnish a bank guarantee as security in lieu of immovable property which would sufficiently secure the interest of the Central Excise department.

This Court granted that application and held that the petitioners were bound by the same terms and conditions on which the earlier order was passed. Accordingly, the petitioners furnished a bank guarantee for the aforesaid sum. It appears that thereafter the Bank refused to renew the bank guarantee and, therefore, the bank sent the cheque for honouring the bank guarantee and accordingly in Civil Application No.3473 of 2002 filed by Union of India and the Officers of the Excise Department, this Court passed order dated 7.5.2002 permitting the Department to encash the cheque sent by the bank, subject to the outcome of the petition. That is how, the petitioner-Company paid an amount of Rs.3,24,252/- to the Department. However, since the amount has been paid under the aforesaid circumstances, Mr Gupta for the petitioners submits that the petitioners are entitled to agitate the grievance raised in the petition and the petitioners are accordingly pressing the petition on merits.

3. On merits, Mr Gupta has invited our attention to the rival tariff items and submitted that the goods in question fall under Tariff Item No.44. Apart from the said submission, Mr Gupta has also submitted that once the Department had approved the classification on 11.6.1985 under Rule 173B of the Central Excise Rules, it is not open to the Department to change the classification with retrospective effect. Reliance has been placed on the decision of the Apex Court in ESPI Industries and Chemicals Pvt. Ltd. Vs. Collector of Central Excise, Hyderabad, . It is next contended that even otherwise the Baroda Collectorate of Customs issued Trade Notice No. MP/151/85 dated 8.7.1985 (Annexure "A") clarifying that the Time recorders and Factory gate attendance punch and clocks show time of the day with extra gadget for punching time on a card as and when required and, therefore, they merit classification under Tariff item No.44 of the Central Excise Tariff. Similar Trade Notice No.138/86 was issued by the Calcutta

Collectorate on 3.7.1986 in respect of the Time recorders and Factory gate attendance punch card clocks that they merit classification under Tariff item No.44. Mr Gupta has also placed reliance on the budget notes to Finance Bill of 1977-78 whereby Tariff Item No.44 was introduced in Parliament on 17.6.1977 and similar Trade Notice No.115/1977 dated 4.7.1977 issued by the Bombay Collectorate following the Central Board of Excise and Customs'' Tariff Advice.

4. On the other hand, Mr Shaikh, learned Additional Standing Counsel for the respondents has opposed the petition and submitted that the primary purpose of Time Punching Clocks is not to show time but to show attendance of the workers and, therefore, it cannot fall under Tariff Item No.44 and accordingly, the Assistant Collector rightly classified the goods as falling under Tariff Item No.33D as they are the office machines.

5. In view of the controversy involved in this petition, it is necessary to set out the two Tariff Items being 44 and 33D, which are as under:-

-- Item Tariff Description Rate of No. duty -- 44 Watches, clocks and time-pieces, Ten primarily designed to show the time per cent of day advalorem -- 33D Office machines and apparatus,inclu- Twenty ding type-writers, calculating percent machines, cash registers, cheque advalorem writing machines, accounting machines, statistical machines, intercom devices (but excluding telephones), teleprinters and auxiliary machines for use with such machines, whether in assembled or unassembled condition, not elsewhere specified. Explanation - The term "office machines and apparatus" shall be construed so as to include all machines and apparatus used in offices, shops, factories, workshops, educational institutions, railway stations, hotels and restaurants for doing office work, for data processing and for transmission and reception of messages. --

6. It is true that the Time punching clocks manufactured by the petitioner serve the additional purpose of recording attendance of workers over and above showing the time of the day. But recording attendance of workers would not be of significance if the time of the day when the workers enter the factory is not shown by the machine. It, therefore, cannot be said that the primary purpose of the time punching machine is not to show time of the day. Moreover, the Department itself issued various clarifications vide Trade Notices that such Time punching clocks or Time recorders or Factory gate attendance punch clocks show time of the day with extra gadget for punching time on the card as and when required and, therefore, they merit classification under Tariff Item No.44 of the Central Excise Tariff. Even the budget notes to the Finance Bill of 1977-78 for Tariff Item No.44 read as under:-

"The item does not include stop watches and other articles which are not designed to show the time of the day. However, an article which shows the time of the day and serves some other purpose in addition would be assessable under this item."

The Bombay Collectorate also issued Trade Notice No.115/1977 dated 4.7.1977 in the following terms:-

"Item No.44 in the Central Excise Tariff does not include stop watches and other articles which are not designed to show the time of day. However, any article which shows the time of day and serves some other purpose in addition would be assessable under this Item."

7. It is thus clear that the Department itself took the view at the relevant time that when the item shows the time of the day and also serves some other purpose in addition, the item would be assessable under Item No.44. It would, therefore, appear that it was for the above reason that the Department had earlier in June 1985 accepted the classification made by the petitioner under Tariff Item No.44 and, therefore, as per the decision of the Apex Court in ESPI Industries and Chemicals Pvt. Ltd. Vs. Collector of Central Excise, Hyderabad, where classification was accepted by the Department, the Department cannot take a somersault and contend to the contrary for the purpose of invoking Section 11-A of the Central Excise Act. The impugned order relates to the period between June 1985 and February 1986, out of which, the period between June 1985 and November 1985 was obviously covered by the classification approved by the Department on 11.6.1985. The show cause notice dated 12.12.1985 (Annexure "H") could at the highest have been issued for the period from December 1985 onwards till the tariff item came to be amended in February 1986, that is for the period of barely three months. However, even for that period the classification issued by the Department through the aforesaid trade notices clearly required the Department to classify the time punch clocks as falling under Item No.44 and, therefore, the petitioner is entitled to succeed.

8. Accordingly, the petition is allowed. The impugned order dated 16.5.1986 at Annexure "M" to the petition passed by the Assistant Collector of Central Excise and Customs, Division-II, Baroda is quashed and set aside and the petitioner-Company is, therefore, entitled to the consequential relief of refund of the amount encashed under the bank guarantee as indicated earlier in this judgment.

Rule is made absolute to the aforesaid extent with no order as to costs.

