
(1998) 06 CAL CK 0021
In the Calcutta High Court
Case No : Writ Petition No. 932 of 1998

Exide Industries Ltd.

APPELLANT

Vs

Commissioner of C. Ex.

RESPONDENT

Date of Decision : 11-06-1998

Acts Referred:

Central Excise Rules, 1944 — Rule 173Q

Central Excises and Salt Act, 1944 — Section 11A, 35, 35F

Citation : (1999) 105 ELT 18

Hon'ble Judges : Samaresh Banerjea, J

Bench : Single Bench

Advocate : Bhaskar Prasad Gupta, for the Appellant; Manibhusan Sarkar, for the Respondent

Judgement

Samaresh Banerjea, J.—In the instant writ petition, the petitioner-company has challenged an order dated November 6, 1997 and March 4, 1998 passed by the Customs Excise and Gold (Control) Appellate Tribunal, Eastern Bench, Calcutta.

2. It is the case of the petitioner that it carries on business of manufacturing various types of electric accumulators including stationary cells/batteries. It is contended that it has been judicially pronounced that in the commercial sense as well as technically a single cell is a battery and it is not necessary that there must be more than one cell to make up a battery. The company manufactures, inter alia, cell/battery of two volt capacity which is designed for service at a permanent location and supplies electrical energy without any accessory being required for the said purpose. It is contended that each two volt cell by itself is a stationary battery commercially as well as technically and independently functions as one. It is further submitted that a stationary battery is a storage battery designed for service at a permanent location unlike other batteries designed for use in mobile locations like vehicles etc. Stationary batteries are mainly used in sectors like Telecommunication, Power, Defence, Railways etc. in fixed locations as stand by for providing emergency power supply so that the

disruption in normal power supply does not affect the work in such critical sectors. Because of the nature of use of the stationary batteries, their dimensions vary according to the fixed location where the same are intended to be used. Other storage batteries are mainly purchased by vehicle manufacturers. Thus, the stationary batteries are normally used in stationary applications in fixed locations as opposed to other storage batteries which are used in cars, trucks, jeeps, tractors etc.

3. It is also contended that in view of the different applications of the stationary batteries and other storage batteries, the materials used for the manufacture and construction thereof are different. The Company's factory came under the purview of Central Excise in the year 1955. Since inception, the company has been duly filing classification lists along with detailed list of the various types of electric accumulators including stationary cells/batteries being manufactured by it and the company is always claiming exemption under the Notification bearing No. 16 / 55-C .E. for the period up to February 28, 1986 in case of such stationary batteries. The said classification lists filed since inception were duly approved and the exemption as claimed was duly granted after a full and thorough enquiry and/or investigation. The Central Excise Authorities were all along fully satisfied that the goods in question were stationary batteries and were exempted under the said notification. The goods in question were also correctly described in the Central Excise Gate Passes as stationary cells/batteries and copies of the said gate passes were also duly filed with the Central Excise Department.

4. The respondents in November 1994 issued a show cause notice dated November 16, 1994 requiring the Company to show cause as to why it should not be required to pay a sum of Rs. 4,78,80,531 /- for the period from November 1989 to February 1994 in respect of the two volt stationary cells/batteries and further why penalty should not be imposed upon it under Rule 173Q of the Central Excise Rules, 1944. It is alleged in the said show cause notice that the goods in question were not stationary batteries and that a single stationary cell was not a stationary cell as claimed by the Company and only several such cells arranged in a particular form with the aid of accessories could be called a stationary battery. The petitioner replied to the said show cause notice denying the allegations made therein. But the Respondent No. 1 by the order dated May 20, 1996 rejected the Company's contentions and confirmed the demand and also imposed a penalty of Rs. 50,00,000/-.

5. Being aggrieved by the said order, the petitioner preferred an appeal to the said Act which is pending.

6. In the said appeal, the petitioner also made an application for exemption of payment of pre-deposit.

7. By the order dated November 6, 1997, the Tribunal being of the view that the petitioner did not have a good prima facie case on merits and on the question of

limitations, rejected the prayer of the petitioner for exemption and directed deposit of Rs. 2 crores within a period of three months.

8. Thereafter, an application was made by the petitioner for modification and/or verification of the order furnishing certain particulars on several grounds. By the order dated March 4, 1998, the Tribunal has rejected the aforesaid application but extended the time for making such pre-deposit.

9. Mr. Bhaskar Prasad Gupta, learned Senior Counsel appearing on behalf of the petitioner, relying upon the decision of a learned Single Judge of this Hon'ble Court in the case of Bongaigaon Refinery and Petrochem. Ltd. Vs. Collr. of C. Ex. (A), , has submitted, inter alia, that the expression "hardship" as expressed in Section 35F of the Central Excise Act, would include, prima facie case of an appellant on merits. It has been contended that examination of the order of the Tribunal will indicate that there has been no proper application of mind at all by the Tribunal as to the prima facie merits of the case and the observations of the Tribunal that the appellant before the Tribunal does not have a good prima facie case is clearly erroneous. It has been further submitted that there has also been no consideration as to the question that if the amount which is now sought to be realised by the respondents is to be paid payment of such a huge amount will affect the working capital of the Company and the same will also cause hardship to the Company. It was also submitted that the Tribunal has also not considered, while considering the application, u/s 35F of the said Act and passing an order thereunder, how the interest of the Revenue will be protected which is also relevant consideration as held in the aforesaid case of Bongaigaon Refinery (supra).

10. Mr. Manibhushan Sarkar, learned Senior Counsel appearing for the Revenue, on the other hand has submitted, inter alia, that the Tribunal, having exercised its discretion u/s 35F of the said Act validly and properly, no interference is called for by the Writ Court. It has been submitted that the Tribunal has given further consideration also on the merits of the case that the appellant before the Tribunal does not have a good prima facie case and the petitioner/Company certainly cannot be said to be suffering any hardship if such payment is required to be made. Mr. Sarkar has also submitted that the application made by the petitioner before the Tribunal was really at the stage of recovery and in such view of the matter, there is no reason why the appeal itself should not be heard out and in fitness of things the petitioner should be directed to deposit the entire sum as directed by the Tribunal or furnish bank guarantee in respect thereof. As it has already been held in the aforesaid case of Bongaigaon Refinery (supra) that the expression "undue hardship" used in Section 35 of the Act would cover a case whether the appellant has got a prima facie case.

11. In such view of the matter, while considering the application made in Section 35F of the Act by the petitioner before the Tribunal, it was incumbent upon the Tribunal also to consider carefully whether the appeal which has been filed by the petitioner before the Tribunal has prima facie merits and that there is a strong

prima facie case.

12. After careful consideration of the order of the Tribunal passed on November 6, 1996, I am constrained to hold that the finding of the Tribunal that the present petitioner, who is the appellant before the Tribunal, does not have a good prima facie case, cannot be sustained.

13. The grounds on which such appeal has been preferred have been detailed in the memorandum of appeal as well as in the present writ petition and therefore it is not necessary for this Court to refer to them the same in details.

14. It is not disputed that for a long period of time, in fact for almost 40 years, in respect of the goods in question exemptions were being claimed by the petitioner/Company and were being granted. The descriptions of the goods were also indicated in the relevant documents and therefore the respondents were quite aware of the same. The interpretation which is now sought to be made by the respondents that the same cannot be called a stationary battery and therefore the same is not liable to an exemption, is a matter therefore which has to be gone into and requires serious consideration and therefore certainly it cannot be said that the petitioner does not have a good prima facie case. On the contrary, the grounds which have been made out in the grounds of appeal, which have been gone into by myself, indicate that the petitioner certainly has a strong prima facie case in the appeal. That apart, the Tribunal has overlooked that in a number of decisions the Supreme Court, including the case of Tata Iron and Steel Co. Ltd. Vs. Union of India (UOI) and Others, , while considering the question of limitation u/s 11A of the said Act, has held that when in 1962 the appellant there was filing classification lists containing the description of the items and showing them as liable to the payment of excise duty only under Item No. 26AA(ia) and these lists were accepted and approved by the Excise authorities, it certainly cannot be said that there was any suppression of fact. The Tribunal did not apply its mind at all to the fact that this classification list in the instant case was also being filed for long period of time for almost 40 years claiming such exemptions and the same was being approved. Under such circumstances, the petitioner/Company certainly also has a strong prima facie case on the question of limitation.

15. It also appears to this Court that the Tribunal has also not considered the question of hardship vis-a-vis the claim of the petitioner that such amount not having been realised from the customers, such payment will make a tremendous strain to the working capital of the Company which will certainly amount to undue hardship to the Company. It also does not appear to this Court that in deciding such a question the Tribunal has applied its mind to the question in what manner the interest of the Revenue will be protected and really mechanically passed an order directing the appellant to put in a sum of Rs. 4 crores.

16. Mr. Gupta, appearing for the petitioner, has submitted that his client is entitled to total exemption from pre-deposit and the interest of the Department

can be well-secured by passing another interim order as it was done in the said Bongaigaon case (*supra*).

17. Mr. Sarkar, however, opposed such prayer and stated that the petitioner may be directed to furnish bank guarantee or its property should remain charged.

18. I am not inclined to go into such question. Since I am of the view that the Tribunal has disposed of the application made by the petitioner on the erroneous view that the petitioner/Company does not have a *prima facie* case and has not considered the other relevant factors as aforesaid, the matter should go back to the Tribunal for reconsideration of the matter in accordance with law.

19. The order dated November 6, 1997, as also the order dated March 4, 1998, being Annexures "K" and "M" to the writ petition, passed by the Tribunal in E/R-260/96, R-308/96 and E/R-260/96 respectively, are hereby set aside.

20. The Tribunal will consider the application made by the petitioner u/s 35F of the Act along with the application for modification afresh in accordance with law. It is however made clear that this Court already having held that the appellant does have a good *prima facie* case, the Tribunal while considering such matter, will proceed on the footings that the appellant has got a good *prima facie* case.

21. It is further made clear that whether the petitioner should be exempted entirely from the payment of the pre-deposit or partly and in what manner the interest of the Revenue will be protected shall be decided by the Tribunal in accordance with law.

22. It may be recorded that since both the parties agreed that the question involved in the present writ petition is really a question of law and can be disposed of without any affidavit, the matter has been disposed of without affidavits. But since no affidavit-in-opposition has been filed, it will be deemed that the respondents have not admitted the allegations made in the writ petition.

23. All parties concerned are to act on a signed copy of the operative portion of this judgment on the usual undertakings.