

(1987) 07 BOM CK 0069

In the Bombay High Court

Case No : Writ Petition No. 1910 of 1981

Extrusion Processes Pvt. Ltd. and others

APPELLANT

Vs

Assistant Collector of Central Excise, Bombay and another

RESPONDENT

Date of Decision : 22-07-1987

Acts Referred:

Central Excise Rules, 1944 — Rule 56A

Citation : (1987) 3 BomCR 111 : (1988) 18 ECC 147 : (1989) 20 ECR 441 :
(1987) 31 ELT 916

Hon'ble Judges : H. Suresh, J

Bench : Single Bench

Judgement

1. The petitioners are the manufacturers of aluminium metal containers, collapsible tubes and extruded shapes etc. The products manufactured by them are chargeable to excise duty under Tariff Item No. 27 of the First Schedule to the Central Excises and Salt Act, 1944. The said Tariff provides for 50% ad valorem duty on the product.

2. By an exemption notification dated October 4, 1979, issued in exercise of the powers conferred by Rule 8(1) of the Central Excise Rules, the Central Government exempted, inter alia, aluminium other than wire rods manufactured from aluminium ingots or billets from excise duty in excess of 40% ad valorem. By another exemption notification bearing No. 192/81-C.E., dated December 3, 1981, the Central Government superseded the earlier exemption notification dated October 4, 1979 and thereby exempted aluminium falling under Tariff Item No. 27 of the first Schedule, so much of the duty of excise leviable thereon as was in excess of 40% ad valorem. By another exemption notification also dated December 3, 1981 bearing No. 193/81-C.E., the Central Government exempted aluminium of the description specified in the table annexed to the said notification from so much of the duty of excise leviable thereon as is in excess of the duty specified in the corresponding entry in column No. 4 of the said table. A copy of the said notification is annexed to this petition at Ex. B and it reads as

follows :

NOTIFICATION

No. 193/81-Central Excises

GSR No. In exercise of the powers conferred by sub-rule (1) of rule 8 of the Central Excise Rules, 1944, the Central Government hereby exempts aluminium of the description specified in column (3) of the Table hereto annexed and falling under the sub-items, specified in the corresponding entry in column (2) of the said Table, of Item No. 27 of the First Schedule to the Central Excises and Salt Act, 1944 (1 of 1944) from so much of the duty of excise leviable thereon as is in excess of the duty specified in the corresponding entry in column (4) of the said Table.

Description	Rate	of	duty	Sr. No.	Sub-Item
				(1)	(2) (3) (4)
				1.	(a)(i)
Aluminium in any crude form Twenty per cent. including ingots, bars, blocks, ad valorem. slabs, billets, shots and pellets. 2. (a)(ii) Wire bars. Twenty one per cent. ad valorem. 3. (a)(ii) Wire rods produced by primary Twenty one per producers. cent. ad valorem. 4. (a)(ii) Wire rods produced by others. Rupees two hundred & thirty- three per metric tonne. 5. (a)(ii) Castings not otherwise specified. Twenty-six per cent. ad valorem. 6. (aa) Waste and scrap. Twenty per cent. ad valorem. 7. (b) Manufacturers, namely, plates, Twenty-six per sheets, circles (other than cent. ad valorem. circles having thickness of and above 0.56 mm but not above 2.0 mm) strips, shapes and sections in any form or size, not otherwise specified. 8. (b) Circles having thickness of Fifteen per and above 0.56 mm but not cent. ad above 2.00 mm. valorem. 9. (c) Foils. Twenty-five per cent. ad valorem. 10. (d) Pipes and tubes other than Twenty-six extruded pipes and tubes. per cent. ad valorem. 11. (e) Extruded shapes and sections Twenty-six including extruded pipes and per cent. ad tubes. valorem. 12. (f) Containers, plain, lacquered Twenty-six or printed or lacquered and per cent. ad printed. valorem.					

Provided that in respect of goods specified against Serial Nos. 2, 5, 7, 8, 9, 10, 11 and 12 of the said Table and manufactured from aluminium of any description mentioned in column (3) of the said Table on which the duty of excise or the additional duty leviable u/s 3 of the Custom Tariff Act, 1975 (51 of 1975) has been paid, the exemption contained in this notification in respect of such goods shall apply only if an officer not below the rank of an Assistant Collector of Central Excise is satisfied that the said duty of excise or the excise or the additional duty, as the case may be, had been paid at the rates specified in this notification or in the notification of the Government of India in India Ministry of Finance (Department of Revenue) No. 264, Customs, dated the 3rd December, 1981.

Explanation : For the purpose of this notification the expression "primary producer" means any person licensed or registered under the Industries (Development and Regulation) Act, 1951 (65 of 1951) who produces aluminium from bauxite or alumina."

3. This notification will show that aluminium in any crude form has been exempted from duty in excess of 20% ad valorem. Further, aluminium pipes and tubes other than extruded pipes, tubes and sections including extruded pipes and tubes and containers, plain, lacquered or printed or lacquered and printed have been exempted from duty in excess of 26% ad valorem. So far so good. But we are really concerned with the proviso to the notification. This proviso, in terms, says that exemption contained in this notification in respect of finished items as mentioned therein shall apply only if an Officer not below the rank of an Assistant Collector of Central Excise, is satisfied that in respect of the raw material the duty was paid as mentioned as Serial No. 1 of this notification. In other words, if a manufacturer and aluminium in any crude form, in respect of which he had paid the duty a 20% pursuant to this notification, only such manufacturer on manufacturing finished products out of such raw material can claim the benefit of exemption in respect of his finished products. In other words, if a manufacturer has paid any other duty for aluminium in any crude form than what is mentioned in this notification, such a person will not get the benefit in respect of the finished products.

4. In the present case what happened was, the petitioners, comprising three companies, had in all about 1000 metric tonnes of aluminium which, according to them would last for about three months" production time, in respect to which they had paid a higher rate of duty as per the earlier notification. In other words, in respect of the said aluminium crude they had to pay duty of 40% plus 10% special excise. Thus the total duty comes 44% on those crude items. If the proviso is to be construed as it reads, it means the petitioners will not be able to get the benefit of exemption as contained in this notification to their finished products, and, therefore, they will have to pay higher rate duty as per the earlier notification which again works out to about 44%.

5. The procedure, as one knows, is that when the finished product comes into existence and the manufacturers have to pay excise duty, they are entitled to what is known as proforma credit as provided under Rule 56A of the Rules. The principle of proforma credit is that whatever duty the manufacturers have paid on the raw material, they would be entitled to deduct, when they have to pay duty on the finished product out of the said raw material. The net result of this situation is that the petitioners will have to pay higher duty in respect of their finished product with regard to 1000 metric tonnes which were lying with them, while another manufacturer, though producing the same finished product, would be paying a lesser duty by virtue of this proviso. How this works to the disadvantage of the petitioners has been explained in paragraphs 9 and 10 of the petition. Mr. Ganesh has given an illustration as to how the petitioners would

suffer on account of this discrimination as compared to their competitor who has crude item under the latter exemption notification. For example, to manufacture 1000 numbers of half inch diameter Ophthalmic eye ointment tubes, the quantity of aluminium required would be 1.2 kg. the cost of which is approximately about Rs. 22/-, and the wholesale cash price of these 1000 numbers would be approximately Rs. 350/-. The duty on these ointment tubes at the rate of 44% of Rs. 350/- would be Rs. 154.00. In the case of the petitioners, the proforma duty would be 44% on input aluminium and, therefore, that becomes deductible by way of proforma credit (therefore 44% of Rs. 22/- would work out to Rs. 9.68). Therefore, the net excise duty payable by the petitioners on the finished product viz. Ointment tubes, would work out to Rs. 144.32. This was the position before December 3, 1981. But, in the case of the petitioners, the same position would continue and, therefore, they would be liable to pay a duty of Rs. 144.32 as aforesaid. However, in the case of the competitors of the petitioners, the situation after December 3, 1981 would be as follows : that is to say, the excise duty on ointment tubes at the rate of 28.6% of Rs. 350/- would work out to Rs. 100.10 less the excise duty paid at the rate of 28.6% on the input aluminium deductible by way of proforma credit (28.6% of Rs. 22/-) would work out to Rs. 6.29. Thus, the net excise duty payable by the petitioners' competitors on the same product would be Rs. 93.81. Thus, as a result of this impugned proviso to the notification bearing No. 193/81-CE the petitioners have to pay about Rs. 52/- more per thousand tubes as compared to their competitors. What is that justification for this ?

6. Mr. Ganesh has submitted that by virtue of the introduction of this proviso the Government has created two classes viz. a class of manufacturers who have paid higher duty on the raw material and a class of manufacturers who have paid lesser duty on the raw material. As a result of this classification a person who has paid a higher duty for the raw material will have to pay higher duty for the finished product, whereas a person who has paid less duty on the raw product will have to pay less duty on the finished product. Mr. Ganesh characterises this as a provision which is devoid of common sense and does not stand to reason. Broadly speaking this is nothing but discrimination between two similarly situated manufacturers.

7. In Annapuran Match Industries, Cudapah Vs. The Union of India and Another, the Division Bench of the Andhra Pradesh High Court had an identical situation to deal with. Under a certain notification manufacturers of matches were characterised under four categories : "A" (those whose output for the financial year 1964-65 exceeded 4000 million matches), "B" (those whose output exceeded 500 million, but did not exceed 4000 million) "C" (those whose output exceeded 75 million but did not exceed 500 million) and "D" (whose output did not exceed 75 million). The duty had been gradually scaled down from Rs. 4.60 per gross for category "A" to Rs. 4.40 for category scaled "B" to Rs. 4.10 to category "C" and to Rs. 3.75 for category "D". But the notification added a proviso which said that in respect of a factory from which no matches are cleared

during a financial year for which it had a licence, such a manufacturer shall pay at the rate appropriate to a "B" category-factory on matched cleared during the following financial year. Now the petitioners although had a licence for the year 1964-65 did not commence production till October 1966 and their production had not exceeded 75 million matches and, therefore, the duty payable was at Rs. 3.75 per gross. However, by virtue of the proviso they were required to pay a higher duty applicable to a "B" category factory. This was held to be utterly unrelated to the scheme of levy of excise duty based on the output of a particular factory and the Court said (at page 72) as follows :

"In fact it runs counter to the object of the categorisation of the factories based on their output. Any such imposition of a higher duty on factories which fall within category "D" but which have not cleared any matches during the financial year 1964-65 would actually amount to the levy of a penalty for non-production of the matches which is not the object of the Act or even the Notification. The Notification merely contemplates imposition of duty based on the output during the Financial year 1964-65 and does not contemplate the levy of any penalty. But in actual working the factories which did not clear any matches during the Financial year 1964-65 though belonging to category "D" would have to pay a higher duty than the other factories falling under the same category : they have to pay Rs. 4.40 per gross as against Rs. 3.75 per gross. The discrimination between the factories similarly placed is violative of Article 14 of the Constitution of India and must therefore be struck down as void."

8. Mr. Sethna sought to justify this proviso. He firstly submitted that there has to be normally a parity of duty between the raw material and the finished product. He submitted that accordingly when the new notification was issued the duties on the raw material and the finished product were again balanced. He submitted that the proviso became necessary as, according to him, the manufactures would otherwise make a profit out of the duty itself. He submitted that if such a proviso was not incorporated a manufacturer who has paid a higher duty would get a greater proforma credit on the finished product. Mr. Sethna submitted that what the petitioners are seeking is, that they should have the proforma credit under the old notification and that they should have the benefit of the new notification as far as the finished products are concerned. If the proviso was not made applicable, the petitioners would be in an advantageous position as compared to the new purchasers of raw products.

9. Plainly, these submissions are beyond my comprehension. If the principle of proforma credit is that whatever duty a manufacturer pay as on raw material is to be deducted on the finished product, I cannot understand as to how such a distinction can be made. If the petitioners had paid a higher duty on the raw products they are certainly entitled to deduct whatever duty they have paid on the finished products. I cannot understand as to how by deducting whatever they have paid by way of proforma credit the petitioners can be said to be making profit out of duty. The petitioners have demonstrated as to how with regard to

the same finished products, the petitioners have to pay a higher duty while the other competitors who have purchased raw material after December 3, 1981, though producing the same product, will have to pay a lesser duty. Per se, in my view, on any first principle of taxation it is invidious to levy different rate of duties for the same product manufactured by two similarly situated manufacturers.

10. Mr. Sethna then sought to justify this proviso on the basis that this is a condition and the petitioners have to satisfy the said condition for the purpose of getting the benefit of the exemption notification. He submitted that those manufacturers who can avail of the benefit of the exemption notification would be entitled to get the same benefit. Since the petitioners are not in a position to comply with the condition of the exemption, the petitioners cannot make any grievance.

11. Here again my reaction is that if this proviso is a condition, the condition creates a class, and that class has to be justified. Per se, the Government is unable to justify this classification at all. It is beyond all reasonable comprehension. Therefore, if there is no rational principle in this classification at all, the proviso must necessarily go. Mr. Sethna sought to submit that assuming that this result in any classification, there is nexus between the classification and the object. He said that the nexus is the relation of the proforma credit that is available. I cannot understand as to what Mr. Sethna wants to convey thereby. But what is the object ? To me, it seems nothing but discrimination. The principle of proforma credit is the same to every manufacturer. That cannot be a criterion for introducing a classification.

12. In the affidavit-in-reply the respondents have stated that there was no obligation, statutory or otherwise on the part of the petitioners to store 1000 metric tonnes. Perhaps, the respondents wanted to suggest that if the petitioners have stored 1000 metric tonnes they have done so on their own and at their own risk. Here again, I could have appreciated this contention if the respondents were to say that this proviso was introduced because in the market or amongst the manufacturers, there were large scale hoarding of aluminium raw material and, therefore, with a view to curb such hoarding this proviso was introduced. That is not the case of the Government. In fact Mr. Sethana categorically stated that the proviso was not direct against the evil of hoarding as such. In any case, in the present case, there is no hoarding of aluminium raw material at all. The three manufacturers had in all a stock of 1000 metric tonnes which according to them would last about three months' production. That, certainly, is not hoarding. Therefore, there is no reason as to why this proviso was introduced.

13. Since the proviso admittedly divides the manufacturers into two classes, firstly, the Government has to justify such a classification. Secondly, the Government has to set out reason for having such a classification. And thirdly, the Government must establish that there is a rational relation between the classification and the object sought to be achieved. The Government has failed in

all these three things miserably. Therefore, this proviso is clearly arbitrary and will have to be struck down.

14. It appears that during the pendency of this petition the Government had issued similar notifications on or about November 13, 1982. By way of an amendment to the petition, those provisos to the said notification have also been challenged in the present petition. All those provisos as] provided under those notifications will also have to be necessarily struck down as violative of Article 14 of the Constitution of India.

15. In the result the petitioners must succeed and I, therefore, pass the following order :

Rule is made absolute in terms of prayers (a), (b) and (b-1).

As regards the amount to be refunded, I direct that the Government should refund the entire amount paid by virtue of application of the proviso to the said notifications, within a period of three months from today.

16. It appears that the petitioners have furnished some bank guarantees at the interim stage. The same will also stand discharged and the same are to be cancelled and to be handed over to the petitioners within a period of six weeks from today.

17. The petitioners are also entitled to the costs of this petition.