(1978) 11 AHC CK 0062

In the Allahabad High Court

Case No : Writ Petition No''s. 370/76 and 373/76

Geep Flashlight Industries Ltd. APPELLANT

Vs

Union of India (UOI) and Others RESPONDENT

Date of Decision : 29-11-1978

Acts Referred:

Central Excise Rules, 1944 — Rule 10, 10A, 40, 49, 9

Citation : (1979) 4 ELT 674

Hon'ble Judges : V.K. Mehrotra, J;H.N. Seth, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

V.K. Mehrotra, J.—Petitioner M/s. Geep Flashlight Industries Ltd. is a public limited company incorporated under the Indian Companies Act, 1913 and in a manufacturer of dry cell batteries. Zinc cans, manufactured out of zinc ingots, ate needed for manufacturer of dry cell batteries of which the process, according to the petitioner, involving melting of zinc ingots purchased by the petitioner in a furnace and then pressing the same into moulds to form zinc slabs. These slabs are heated and rolled into a fiat form with the help of rollers out of which callots are punched. Front hose callots, cans are made by the impact extrusion process whereafter required chemicals are filled in the cans which take the shape of finished dry cell batteries after sealing and cladding. The entire process, according to the petitioner is a continuous and the rough rolled flat forms of zinc constitute only an intermediate stage in the process. These flat forms of zinc are not removed from the premises in which dry cell batteries are manufactured by the petitioner and are immediately put to use by feeding them while hot into punching process. The flat form rolled out from a zinc ingots by the petitioner as a part of the process of manufacture of dry cell batteries, is a rough rolled one variably uniform in length, width arid thickness with orached side and uneven and cracked ends and do not have a clear and smooth surface but the surface is scratched, rough and uneven. The flat forms which are produced in the factory of the petitioner by the process of successive rolling on manually operated rolling process tire not a marketable commodity and cannot be sold in the open market.

2. The petitioner claims that it started producing these rough rolled flat forms of zinc in its factory from February 15, 1969. Though the authorities Of the Central Excise Department of the Union of India were frequently visiting the factory of the petitioner at Allahabad and inspecting the entire process of manufacture of dry cell batteries including the initial stage of the melting of Zinc ingots and were fully aware that these rough rolled zinc flat forms were being produced by the petitioners, they never considered that these flat form as could be described as "zinc sheet" or were eligible to duty as such under item No. 26-B(2) of the First Schedule of the Central Excises and Salt Act, 1944. On the instructions, however, of the Central Board of Excise Department at Allahabad decided in February 1973 to treat these rough rolled flat forms of zinc as "zinc sheets" for which a duty of excise was leviable under the aforesaid item No. 26-B(2) of the first schedule of the Act.

3. The petitioner attempted to explain the petition to the Excise Authorities and claimed that the rough rolled flat forms of zinc which urged at an intermediate stage of their process of manufacture of dry cell batteries, could not be treated as "Zinc sheets" within the meaning of item No. 26-B(2) of the Schedule but failed to convince them. By his order dated February 16, 1973, the Assistant Collector, Central Excise, Allahabad held that the petitioner manufactured zinc sheets as defined under item No. 26-B(2) and called upon the petitioner to take immediate steps to observe all the formalities as envisaged under the rules and to pay excise duty at the appropriate rate on the zinc sheets manufactured by it. The petitioner filed an appeal against the aforesaid order on March 10, 1973 to the Appellate Collector, Central Excise, New Delhi who made a personal visit to the Factory of the petitioner at Allahabad on June 23, 1974 to make on the spot study and he was shown the process of manufacture by the petitioner in its entirety. The petitioner also made written submissions before him subsequent to this is it. However, the appellate Collector dismissed the appeal of the petitioner by an order dated March 24, 1975. The petitioner challenged these orders by means of writ petition No. 620 of 1975 in its court but a Bench dismissed it summarily on July 8, 1975 on its view that the petitioner had a clear alternative remedy by way of revision to the Central Government. The petitioner then filed an application in revision before the Central Government u/s 36 of the Act on July 28, 1975. This revision application was, however, rejected by the Central Government by an order dated April 8, 1976 which as, according to the petitioner, served upon it on May 1, 1976. The petitioner thereupon filed writ petition No. 370 of 1976 in this court assailing the orders. The Union of India, the Appellate Collector, Central Excise, New Delhi and the Assistant Collector of Central Excise, Allahabad are impleaded as the three respondents in this writ petition. The reliefs claimed by the petitioner in this petition, inter alia, are for quashing by a writ or certiorari or any other suitable order, writ or directions the order of the Central Government, issuance of a writ order or directions to the

respondents for bidding them from treating the rough rolled flat forms of zinc as "zinc sheets" and levying excise duty thereupon under item No. 26-B(2) of the Schedule to the Act and issuance of a writ of mandamus or any suitable order-of directions of that nature to the respondents to refund to the petition the amount illegally collected from the petitioner as excise duty on rough rolled flat forms of zinc.

4. It appears that on July 28, 1973, a notice under Rule 10-A under the Central Excise Rules, 1944 was issued by the Superintendent of Central Excise, Allahabad requiring the petitioner to show cause against the recovery from it a sum of Rs. 49,00,139.33 by way of excise duty for zinc sheets manufactured by it during the period between March 15, 1969 and February 12, 1973. The petitioner rejected to the demand but failed. The Assistant Collector, Central Excise, Allahabad confirmed the demand by his order dated April 8, 1976. Writ petition No. 373 of 1976 has been filed by the petitioner assailing the demand on various ground most of which are identical to those taken by it in its earlier petition. No. 370 of 1976. The relief asked for by the petitioner in this petition includes a prayer for quashing the order dated April 8, 1976 passed by the Assistant Collector, Central Excise, Allahabad.

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8. Sri Ravindra Narain Learned counsel appearing on behalf of the petitioner is both the petitions, has made three submissions before us. The submission in the forefront has been that the rough rolled flat forms which were obtained by the petitioner by the process of rolling in its factory at an intermediate stage during the process of manufacture of dry cell batteries by it were not a marketable commodity and were not known to these market as sheets or strips of zinc which alone aware covered by entry No. 26-B(2) of First Schedule of the Act. Consequently, they were not excisable to excise . duty. In the next place, it has been urged by the learned counsel that under the scheme of the Act and the rules the excisable event for the levy under relisation of excise duty was removal of the excisable article from the factory which, in the case of the petitioner, never took place because the flat forms of zinc were immediately put to use by feeding them while hot into the punching process in the premises of the petitioner factory itself in the process of manufacture of dry cell batteries which was a continuous one. As such, the demand of excise duty in respect of these flat forms from the petitioner was without authority of law. Lastly, it has been urged that the demand of duty in respect of the flat forms manufactured by the petitioner in respect of the past period between March 15, 1969 and February 12, 1973 was almost entirely barred by limitation on account of the provision of Section 40(2) of the Act as it stood at the relevant time and, in any case, largely on account of Rule 10 of the Rules under which alone could the case of the petitioner be covered. We now proceed to consider these submission seriatum.

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16. There has been a great deal of controversy between the parties as to whether the produce which has been the name of "rough rolled flat form" of zinc by the petitioner, is known to the market as zinc sheets or strips. Having regard in particular to the specifications laid down by the Indian Standards Institution as well as those contained in Brussel''s Tariff Nomenclature, it has been strenuously contended by the learned counsel for the petitioner that the produce of the petitioner''s factory cannot be treated to be zinc sheets or strips as known to the market. Inter alia, evidence in the form of affidavits from persons claiming to be familiar with these products as technical experts has also been brought on record on behalf of the petitioner. The respondents have on the contrary, stressed that these cannot be said to establish that the products of the petitioners'' factory are not known to the market as zinc sheets or strips merely because in some details they differ from the specifications contained in the aforesaid evidence. In the alternative, it has been urged on their behalf that even if the evidence put forward on behalf of the petitioner is accepted, it may at best established that there is no general market for the "flat forms of zinc" produced in the petitioner''s factory but it does not, according to the learned counsel for the respondent, negative his submission that these flat forms are known as zinc sheets or strips to the trade of dry cell battery manufacture. In this connection, our attention was drawn to the letter dated September 19, 1974 written by the Secretary of the petitioner company to the Superintendent of Central Excise, Allahabad in which the petitioner had itself acknowledge that it had sent zinc slabs produced immediately after the melting stage to a rolling mill and got them rolled into zinc sheets there for use in the factory for production of /inc callots. That letter, a copy of which is Annexure III to the counter affidavit of Sri K. Sethi, Assistant Collector, Central Excise, Allahabad is in the following terms :

Geep Flashlight Industries Limited Regd. Office : 28 South Road, Allahabad.

The Supers tender S.R.P.I., Central Excise, Allahabad.

URGENT EX : EST/4716 Dt. 19.9.74

Sub : Rough rolled zinc (since sheet) Premission to bring duty paid goods in the factory.

Dear Sir,

Our rolling mill producing zinc sheets is in the state of break down since 139.1974 and it is feared that it might take further 10 to 15 days to put it in operation.

Since zinc callots which are produced out of zinc sheets, are immediately required for continuation of production of dry cell battery, we have arranged for the time being to get the zinc slabs rolled into zinc sheets from a rolling mill from Kanpur/Mirzapur. The name of the rolling mill shall be intimated to you on finalisation.

We therefore, intend to send zinc slabs (produced immediately after milling stage) to the said rolling mill and get back zinc sheets from them duly duty paid. These duty paid zinc sheets shall be stored in the place shown X in the enclosed ground plan "and will be issued for further processing i.e. punching callots.

We, therefore, request you to kindly accord permission to store duty paid goods in factory premises as provided under Rule 173R read with Collectorate Notification No. 9-CE/1969.

Keeping in view utmost urgency of the material without which the factory will face closure, we request that immediate permission may kindly be granted and oblige.

Yours faithfully, For Geep Flashlight Industries Ltd. Sd/- R.P. Agrawal Secretary and C.A."

The letter aforesaid does indicate that to the petitioner, which is admittedly one of the few dry cell battery manufacturing units in the country, the platform from which callots are punched and which is usually manufactured in its own factory process of rolling is admitted to be a product which can be obtained from a rolling mill by getting the same manufactured therein. This letter goes to establish the version of the respondents that the flat forms manufactured by the petitioner as an intermediate product during the process of manufacture of day cell batteries in its factory, are such which are known as a sheet to the manufacture of dry cell batteries and can be obtained by getting the same manufacture from another factory. In his rejoinder affidavit to the counter affidavit of Sri K. Sethi with which the letter aforesaid has been appended as an annexure, Sri Tapan Malik, Works Manager of the Battery Unit of the petitioner company has not disputed the contents or the authenticity of the letter but has attempted to explain that the term "zinc sheet" used therein was a lease repetition of the description of the product as used by the Central Excise Department. We are, however, of opinion that on the admission of the petitioner itself it is clear that the product described as flat form of "Zicee" by the petitioner is one which is known as "Zinc sheet" to a manufacturer of dry cell batteries and is a product which can be held to be known as "Zince sheet" to the trade to which the petitioner belongs. It is not necessary for us, therefore, to go into the evidence adduced by the parties in these proceedings and thereafter to pronounce upon the question as to whether the product of the petitioner can be treated to be "Zinc sheets" or "strips" as known to the general market. On the conclusion to which we have arrived, it is clear that the demand by the respondents of excise duty on the fiat form of zinc produced in the petitioner''s factory as an intermediate product during the process of manufacture of dry cell batteries by it on the basis that it fell within the description of "Zince sheets" or "strips" is not contrary to law.

17. That takes us to the next question as to whether the demand of duty from the petitioner was invalid because the excisable event, namely, removal of the excisable articles from the factory, never took place since the flat forms of zinc

were immediately put to use to petitioner by feeding them while not into the punching process in the premises of the petitioner factory itself. Reliance in this behalf has been placed on behalf of the Petitioner upon Rules 9 and 40 of the Central Excise Rules, 1944. Chapter III of the Rules deals with levy and refund of, and exemption from, duty. Rule 7 provides that every person who produces, cures or manufactures any excisable goods, or who stores such goods in a warehouse, shall pay the duty or duties leviable on such goods, at such time and place and to such person as may be designated, in, or under the authority of the Rules, whether the payment of such duty or duties is secured by bond or otherwise, Rule 9 then provides for the time and manner of payment of duty as follows : -

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Relying upon Rule 49 it was urged that unless the excisable goods made in the factory were to be issued out of factory premises, they could not held chargeable to duty. In the case of the petitioner, it is contended, the assertion that the rough rolled flat forms of zinc were not removed from the premises in which dry cell batteries were manufactured and that they were immediately put to use in making callots by feeding them, while hot, into punching process having not been disputed by the respondents, the demand of excise duty could not be sustained. The respondents have contended this submission by placing reliance upon various rules contained in Chapter VII-A of the Rules which deals with removal of excisable goods on determination of duty by producers, manufacturers or private warehouse licensees, which included what is known as "self-assessment" procedure.

Provisions of Chapter VII-A are, as provided in Rule 173-A, to have over-riding effect in case there is a conflict between the provisions of this Chapter and those contained in any other Chapter in relation to such excisable goods to which the provisions of Chapter VII-A are made applicable by the Central Government by notification in the official gazette. It is the common case of the parties that by a notification which came into force from August 1, 1959, the provisions of Chapter VII-A of the Rules were made applicable, inter alia, to goods comprised in item No. 26-B of the First Schedule of the Act. It has been urged on behalf of the respondents that under Rule 9 itself it has been provided that no excisable goods shall be removed from any place where they are produced or manufactured whether for consumption or for manufacture of any other commodity in or outside such place unless either excise duty leviable thereon has been paid or sufficient amount which, in the opinion of the Collector, was necessary to cover the duty due on goods intended to be removed, kept in deposit in the account-current of duties permitted to be kept by the Collector instead of requiring payment of duty in respect of each separate consignment of goods removed. A list is to be furnished as required by Rule 173-B by the petitioners which has to determine its liability for duty due to excisable goods intended to be removed as per Rule 173-F and to follow the procedure provided in Rule 173-G and keep an account-current with the Collector separately for each excisable goods, including the zinc sheets. For each consignment the petitioner is required to pay the duty determined by it by debit to such account-current before removal of goods. In substance, therefore, the argument is that even though the flat forms of zinc manufactured and utilised by the petitioner in the process of manufacture of dry cell batteries normally do not go out of the factory premises as such, there is in law a removal as contemplated by Rule 9 because from the place, i.e. the rolling mill where these flat forms are manufactured, they are admittedly removed for consumption or for manufacture of another excisable commodity, i.e. the finished dry cell batteries and payment of excise duty by recourse to a procedure envisaged by Rule 173-G has to be made in accordance with law.

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22. In the instant case, it is noteworthy that under Rule 9 itself the petitioner is precluded from consuming or using the flat forms of zinc produced or manufactured by it by the rolling process, for manufacture of dry cell batteries even in the same premises unless excise duty thereon is paid in the manner provided for by Rule 173-G after determining it under Rule 173-F. That is the position in law and it cannot, therefore, be held that the excisable event in the case of the petitioner had not taken place so as to render him liable for payment of excise duty on the rough rolled flat forms of zinc manufactured by it.

23. The third and the last submission of the learned counsel for the petitioner is that the demand by the respondents of the amount of duty on the flat forms of zinc manufactured between March 15, 1969 and February 12, 1973 through the notice of demand dated July 30, 1973 is barred by limitation. It has been urged that, inasmuch as u/s 40(2) of the Act, as it stood at the relevant time, no suit, prosecution, or other legal proceedings could be instituted for anything done or ordered to be done under the Act after the expiry of a period of six months from the date of the act or order complained of, the demand relating to any period which was beyond six months prior to July 30, 1973 would be irrecoverable. The argument also is that, in any case, any demand in respect of the flat forms manufactured beyond one year before July 30, 1973 would be irrecoverable due to the provisions contained in Rule 10 read with Rule 173-J of the Rules under which any amount of deficiency is duty where it has been short levied through inadvertence, error, collusion or misconstruction on the part of an officer could be required to be made good only within a period of one year from the date on which duty was paid or adjusted in the account-current of the owner.

24. It has been submitted on behalf of the petitioner that the demand of deficiency in excise duty being in the nature of a legal proceeding was governed by Sub-section (2) of Section 40 and as such barring a short period from January 30, 1973, the respondents were not entitled to demand any duty on the sheets manufactured by the petitioner during any other period from March 15, 1969 for which the impugned demand has been raised. The decision of the Supreme Court in the case of Public Prosecutor, Madra v. R. Raju and Anr. (A.I.R. 1972 S.C.

2604) has been relied upon by the learned counsel for the petitioner in this regard. In that case, the respondents were being prosecuted for violation of the provisions of some of the Central Excise rules which were punishable both under the Act as well as under the Penal Code. The respondents were proprietor or employees or agents or licensees of some match factories. The complaints were filed beyond six months from the date of the alleged violation. The Madras High Court took the view that in each of these cases the prosecutions were barred having been commenced beyond the period of limitation prescribed in section 40(2) of the Act. The State went up in appeal before the Supreme Court against the aforesaid decision and it was contended on its behalf that Sub-section (2) of Section 40 was intended for prescribing a limitation in respect of prosecutions only against departmental officers or government servants and did not apply to prosecution for offences committed by private individuals for contravention of the Act and the Rules framed thereunder. The Supreme Court took the view that section 40(2) of the Act could not be said to be confined in its operation only to government servants. It was applicable to any person against whom suits or proceedings or prosecution lay for anything done or ordered to be done under the Act. Further, that the non-compliance with the provisions of the Statute by omitting to do what the Act enjoins will be anything done or ordered to be done under the Act. The respondents having filed to pay the lawful dues which are acts to be done or ordered to be done under the Act, the prosecution in respect of such omission would be governed by the rule of limitation provided in the said sub-section. Relying upon the judgment, a Division Bench of the Andhra Pradesh High Court in LB. Satyanarayan v. Superintendent of Central Excise, Warangal Circle and Ors. (Writ petition No. 2516 of 1974 decided on April 1, 1976) held that a notice dated September 17, 1971 issued by the Superintendent of Central Excise. Warangal Circle calling upon the petitioner to make good the deficiency in payment of duty on the stocks noticed on January 31, 1970 as having been short levied with duty was invalid as it had been issued after the'' expiry of a period of six months from the date of inspection in view of section 40(2) of the Act. The Bench interpreted the judgment of the Supreme Court as laying down that a demand by a departmental authority of an amount of duty would be covered by the bar of limitation contained in section 40(2) of the Act. Since according to the learned Judges, the alleged levy of duty and issuance of show cause notices were prior to the Amendment of Section 40(2), the notice could not be sustained. The judgment, however, does not contain any detailed discussion on the question as to why the demand made in departmental proceedings could be said to be covered by the expression "other legal proceedings" as used in section 40(2) of the Act.

25. The submission of the learned counsel for the petitioner is that the expression "legal proceedings" was wide enough to include proceedings initiated by departmental officer? under the provisions of the Act and the Rules framed thereunder since the term signifies all proceedings ''authorised by and taken in accordance with law and could not be confined to a proceeding in a court of law

as suggested by the learned counsel appearing for the respondents. Reliance in this regard was placed on behalf of the petitioner open the decisions in the cases of Shirdmani Sugar Mills Ltd. v. Governor-General in Council A.I R. 1945 All. 345; Governor-General in Council v. Shiramani sugar Mill Ltd. (A.I.R. 1946 E.G. 16) Abdul Aziz Ansari Vs. The State of Bombay, and Pt. Ram Avtar Sharma and Others Vs. Pt. Chakradhar Saran Sharma and Others,

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29. That is the view which has been taken by a Division Bench of the Madhya Pradesh High Court in the case of Universal Cable Ltd. v. Union of India and Ors. 1977 Tax.LR 1925 with which we respectfully concur. To us, too, it appears, that the expression "other legal proceedings" occurring in Section 40(2) of the Act must be held to exclude proceedings initiated by the authorities under the Act for quantification and realization of the amount of duty and that the bar of limitation can only be set up in proceedings before a Court of Law. The Petition cannot, therefore, successfully sustain any objection to the demand of duty made through the impugned notice dated July 30, 1973 on account of the rule of limitation as it obtained at the relevant time in Sub-section (2) of section 40 of the Act.

30. There, however, remains the other limb of the submission made in this regard by the learned counsel for the petitioner. The argument is that the demand of duty for the zinc sheets manufactured by the petitioner during the period between March 15, 1969 and February 12, 1973 is, in a substantial measure, irrecoverable due to bar of limitation of one year brought in Rule 10 by Rule 173-J of the Rules. The respondents, on the other hand, contend then the case is covered by Rule 10-A of the Rules which does not contain any rule of limitation and, therefore, the entire amount demanded is payable by the petitioner. We have read Rules 10 and 10-A earlier. Rule 10-A contemplates that duty or deficiency in duty is payable on a written demand made by the proper officer in cases where either the rules do not make any specific provision for the collection of any duty or any deficiency in duty if the duty has for any reason been short levied. Before therefore, Rule 10-A can be resorted to, it has to be found that either the Central Excise Rules do not make any specific provision for the collection of duty in respect where of a demand is being made by the proper officer or also that there is no specific provision therein for the collection of a deficiency in duty which has been short levied for any reason. In no other case can resort be had to this rule. The case of the respondents before us has been that Rule 10-A will be applicable where there has been no assessment of duty at all in accordance with the Act and the Rules. Reliance in this regard is placed on their behalf on the decision of the Supreme Court in the case of Assistant Collector of Central Excise, Calcutta Division Vs. National Tobacco Co. of India Ltd., . The petitioner, on the contrary, hrs placed reliance upon a Bench Judgment of this Court in the case of Nagrath Paints (supra) in which the demand was largely held to be barred by limitation on the ground that the case was covered

by Rule 10 and not Rule 10-A of the Rule. They also relied upon the decisions rendered by the Supreme Court in the cases of N.B. Sanjana, Assistant Collector of Central Excise, Bombay and Others Vs. The Elphinstone Spinning and Weaving Mills Company Ltd., and R.K. Audim and Others Vs. Special Steel Ltd., Bombay and Another, as well as the decision of the Gujarat High Court in the case of Jamnadas Chhotalal Desai and Others Vs. C.L. Nangia and Others, .

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34. In view of this clear enunciation of law it has to be held that even on the facts as alleged by the petitioner no assessment as could have resulted in shot levy of duty within the meaning of that term under Rule 10 as interpreted by the Supreme Court had taken place in the instant case. Consequently, the case must be held to be covered not by Rule 10 (read with Rule 173-J) of the Rules and the demand being thus barred by the limitation provided therein but by the residuary Rule 10-A which does not contain any such rule of limitation provided therein but by the residuary Rule 10-A which does not contain any such rule of limitation so as to preclude .the demand raised in the instant case, being made. The decision of the Gujarat High Court in the case of Jamandas Chhotalal Desai and others (supra) was rendered on a set of facts entirely different from those of the cases before us and does not advance the case of the petitioner. In the view that we have taken, it is clear that this limb of the submission of the learned counsel for the petitioner in regard to his third submission also has to be rejected.

As a result of the discussion attempted above, we have come to the conclusion that the petitioner is not entitled to any relief in these petitions. It is trite that there is no equity about a tax. The flatworms of zinc manufactured in the petitioner''s factory area, in our opinion, covered by entry 26-B (2) of the First Schedule to the Central Excises and Salt Act, 1944 and the petitioner is liable for payment of duty thereon. The past demands are not barred by limitation as contended by the petitioner.

36. In the result, both these petitions fail and are dismissed with costs.

