

(1987) 03 AHC CK 0047

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 1216 of 1983

Hind Cement Products

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 23-03-1987

Acts Referred:

Central Excise Rules, 1944 — Rule 9(2)

Central Excises and Salt Act, 1944 — Section 11A, 11A(1)

Citation : (1987) 14 ECC 26 : (1987) 13 ECR 439 : (1987) 32 ELT 636

Hon'ble Judges : Om Prakash, J

Bench : Single Bench

Advocate : A.P. Mathur and V.K. Agarwal, for the Appellant;

Judgement

Om Prakash, J.—The only question for consideration in this writ petition filed by M/s. Hind Cement Products Limited (hereinafter to be referred as the petitioner unit, which is owned by the Hind Ceramics Limited hereinafter to be referred to as the company) is whether the Customs Excise and Gold (Control) Tribunal was right in sustaining the penalty to the extent of Rs. 65817.63 by the order dated 30th August 1983 1983 ELT 1860 (Ceg) (Annexure 28 to the petition).

2. The petitioner unit is engaged in the business of manufacture of absestos cement pipes and the company carries on the business of manufacture of P.C.C. poles (Prestress Cement Concrete poles). The case of the petitioner unit is that it continued to pay the excise duty until the enforcement of the Notification No. 71/78, dated 1st March 1978. (Annexure 2 to the petition). In para 7 of the petition, it is averred that the petitioner unit was exempted from payment of Central Excise Duty w.e.f. 1.4.1978 in terms of notification (Annexure 2), as the excisable goods upto an aggregate value not exceeding Rs. 5 lacs were exempted thereunder. The petitioner, therefore, submitted on 24th March 1978, a revised classification list (Annexure 3 to the petition). The petitioner was allowed exemption, as the aggregate value of the excisable goods did not exceed Rs. 5 lacs. Declarations (Annexure 14 & 5 to the petition) were also submitted by

the petitioner on 17.4.1979 and on 14.4.1980 indicating that the petitioner unit is owned by the company. Later, a Notification No. 141/79, dated 30th March 1979, effective from 1st April 1979, (Annexure 8 to the petition) came into force, whereby clause (III), was inserted in condition (a) after Clause (II) in the notification (Annexure 2). Condition (a) circumscribes the exemption, allowed by the notification (Annexure 2). The effect of the newly inserted Clause (III) in condition (a) was that the manufacturers manufacturing more than one excisable goods, the aggregate value of which exceed Rs. 20 lacs, were deprived of the exemption. Invoking the newly inserted clause in the notification (Annexure 2), the department took the view that the petitioner was liable to pay excise duty on the goods, removed during the period from 30th March 1979 to 26th March 1981, because the aggregate value of the excisable goods manufactured by the petitioner and the company exceeded the limit of Rs. 20 lacs. A show cause notice dated 2nd May 1981, (Annexure 22 to the petition) was given to the petitioner. Adverting to newly inserted Clause (III) in condition (a) of the notification (Annexure 2), Assistant Collector Central Excise Rampur stated in the show cause notice that "...it becomes clear that the aggregate value of clearances of all excisable goods by Hind Cement Products Limited Rampur or petition, viz. M/s. Hind Ceramics Limited Rampur for home consumption from one or more factories during the preceding financial year i.e. 1978-79 have exceeded Rs. 20 lacs----" The aggregate value of the excisable goods manufactured by the petitioner and by the company having exceeded Rs. 20 lacs, the Collector Central Excise levied excise duty on the petitioner amounting to Rs. 65817.63P under Rule 9(2) of the Central Excise Rules, 1944 (for short the Rules 1944) and a penalty of Rs. 5 lacs by the order (Annexure 24 to the petition). This order was appealed against by the petitioner and then the Tribunal by the order (Annexure 28 to the petitioner) upheld the imposition of excise duty and reduced the penalty from Rs. 5 lacs equal to the amount of excise duty.

3. The petitioner has challenged the Tribunal's order imposing the excise duty as well as the penalty.

4. The respondent filed counter affidavit stating that the aggregate value of clearances of excisable goods by the petitioner unit and the company exceeded Rs. 20 lacs and that in view of the amendment, made by the notification (Annexure 8 to the petition), the petitioner was liable to pay excise duty and since the petitioner mis-stated and suppressed the facts, the duty and the penalty both were rightly imposed.

5. I have heard Shri A. P. Mathur, learned counsel for the petitioner, and the learned standing counsel. Though in the petitions, the petitioner has challenged the imposition of excise duty as well as the penalty, but Sri V. K. Agarwal, representative of the petitioner, who assisted Shri Mathur, learned counsel for the petitioner, gave up the challenge to the imposition of excise duty and restricted the challenge only to the imposition of penalty. In view of the statement of the petitioner's representative, the question whether the excise duty amounting to

Rs. 65817.63 was legally imposed on the petitioner, does not require any consideration and the discussion is limited only to the imposition of penalty. The short" contention of Sri Mathur is that if any excisable goods escape the duty then under Rule 9 sub-rule (2) of the Rules 1944, the excise duty and penalty may be demanded within the period specified in Section 11A of the Central Excises and Salt Act, 1944 (briefly the Act, 1944). Section 11A(1) says that when any duty of excise has not been paid or levied, then Central Excise Officer may within 6 months from the relevant date serve notice on the person liable to pay duty. The proviso to Sub-section (1) of Section 11A extends the limitation of six months to 5 years, if the excise duty has not been levied or paid by reason of fraud, collusion or any willful mis-statement or suppression of facts or contravention of any provision of the Act and the Rules that intend to evade the payment of duty. Sri Mathur adverted to the Tribunal's finding which is as follows :-

"We are therefore of the considered view that this being a case of information and clearances having been effected without revealing true facts, Rule 9(2) has been rightly invoked and that whole of the duty has been rightly demanded and confirmed."

6. The contention of Sri Mathur is that the Tribunal was of the view that the excise duty was not paid by the petitioner by reason of willful mis-statement or suppression of facts, and, therefore, the order imposing duty and penalty beyond the period of six months but within 5 years, was sustained by the Tribunal. It is also argued that the departmental representative made more or less the same argument before the Tribunal. Adverting to para 7 of the Tribunal's order, Sri Mathur contended that the departmental representative urged before the Tribunal that the declaration to which the learned counsel for the appellant had made reference was ambiguous and vague inasmuch as though the name of the proprietor was shown but the address was not indicated nor was there any declaration about other goods being manufactured by the said proprietary unit. "The submission of Sri Mathur is that there is no mis-statement or suppression of facts on the part of the petitioner and, therefore, the limitation of six months for imposing the excise duty and penalty in Sub-section (1) of Section 11A can not be extended to the period of 5 years under the proviso to Sub-section (1) to Section 11A.

7. From the above reproduced material, it is amply clear that all through the departmental representative as well as the Tribunal setup the case of mis-statement and suppression of facts. The contention of Sri Mathur is that the case so set up by the departmental representative and the tribunal is contrary to record and therefore, the penalty imposed beyond the period of six months as envisaged by Sub-section (1) of Section 11A of the Act 1944, deserves to be quashed. I find force in this submission of Sri Mathur. The submission made by departmental representative before the Tribunal are undoubtedly misconceived. The petitioner continued to pay excise duty on the manufacture of asbestos

cement pipes until the enforcement of the notification (Annexure 2) which exempted the excisable goods, aggregate value of which did not exceed Rs. 5 lacs. After the said notification, the petitioner filed revised classification list (Annexure 3) seeking exemption and then filed the declarations (Annexure 4 & 5). The petitioner also addressed a letter (Annexure 6) to the department seeking exemption from maintaining regular records, as it was not liable to pay excise duty by virtue of the notification (Annexure 2). In all these records, the petitioner unit represented that it is owned by the company. The petitioner unit does not manufacture more than one item. The company owning the petitioner unit was always assessed to excise duty. So all the material facts that the petitioner unit is engaged only in the manufacture of asbestos cement pipes, that it sought exemption under the notification (Annexure 2), that it is owned by the company which is engaged in the manufacture of P.C.C. poles and that the company was always assessed to excise duty were in the knowledge of the department and the petitioner can not be accused for having concealed any material facts and for having mis-stated the facts. Therefore, the finding of the Tribunal in para 9 that the petitioner evaded clearance without revealing true facts, is contrary to record. The Tribunal took the view that but for the information received by the department, the petitioner would have escaped the excise duty. The Tribunal has not elaborated as to which information of the fact was received by the department. The mere fact that the petitioner did not pay the duty which it was liable to pay after the enforcement of the notification (Annexure 8), does not lead to the conclusion that the petitioner willfully misstated or suppressed the facts. The case of the petitioner was that the notification (Annexure 8) was not within its knowledge and, therefore, the duty was not paid simply because the duty after the notification (Annexure 9) having come into force, was not paid, no inference can be drawn that the petitioner willfully mis-stated or suppressed the facts. The record shows that no fact was suppressed or mis-stated by the petitioner. I, therefore, agree with Sri Mathur that no penalty was eligible under the proviso to Sub-section (1) of Section 11A beyond the period of six months. The penalty not having been imposed within the period of six months under Sub-section (1) of Section 11A deserves to be quashed.

8. Lastly Sri Mathur argued that redemption fine at Rs. 20,000 was wrongly imposed by the respondent no. 3 by the order (Annexure 24 to the petition). This question has not been considered by the Tribunal at all. Sri Mathur, however, contends that the ground in the revision which was later converted into appeal, was raised, but the Tribunal omitted to consider the same. If this is so, the petitioner may approach the Tribunal under the appropriate provision of law to obtain the order of the tribunal on the said ground.

9. In the result, the petition is partly allowed the tribunal's order (Annexure 28) imposing the excise duty at Rs. 65817.63 is upheld and this order, in so far as, it sustains the penalty of the equal amount, is quashed. On the facts and circumstances of the case, no order as to costs is passed.