
(1994) 09 CAL CK 0017
In the Calcutta High Court
Case No : Matter No. 3498 of 1993

Hindalco Industries Ltd.

APPELLANT

Vs

Collector of Customs

RESPONDENT

Date of Decision : 07-09-1994

Acts Referred:

Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 112, 28

Citation : (1994) 74 ELT 233

Hon'ble Judges : Altamas Kabir, J

Bench : Single Bench

Advocate : P.P. Ginwala, Samir Chakraborty and A. Choudhury, for the Appellant; Rathin Das and Prantosh Mukherjee, for the Respondent

Final Decision : Allowed

Judgement

Altamas Kabir, J.—The petitioner No. 1 Company claims to be carrying on the business of manufacturing aluminium from bauxite ore at its factory at Renukoot in Sonbhadra District of Uttar Pradesh. According to the petitioners, the process of manufacture requires the use of pre-baked carbon anodes which are manufactured by the petitioner Company. Coal Tar Pitch is one of the raw materials which is required for manufacturing such anodes, and the same is largely imported by the petitioner Company from sources in Japan and Germany.

2. According to the petitioners, customs duty is imposed on such import of Coal Tar Pitch, and at all material times there was an additional duty leviable by the customs authorities, commonly known as countervailing duty, which was equivalent to the excise duty chargeable under the Central Excise Tariff on similar goods manufactured in India.

3. It appears that the relevant heading of the Central Excise Tariff is 27.08 and the relevant sub-headings are 2708.11, 2708.19 and 2708.20.

4. Heading 27.08 includes Pitch and Pitch Coke obtained from Coal Tar or from

other Mineral Tars for which no countervailing duty is leviable. Subheading 2708.11 covers Pitch which is obtained by blending Creosote oil or other coal tar distillates, for which the rate of duty is Rs. 100/- per tonne. Sub-heading 2708.19 relates to Pitch obtained by other methods, for which the rate of duty is 15%.

5. According to the petitioners there are two methods of producing Coal Tar Pitch according to the required specifications for manufacture of anodes. One is the "straight run" method whereby coal tars of different compositions are selected and the process of distillation is carefully controlled. According to the petitioners, this method can be used on a small scale and is not viable for commercial production on a large scale. According to the petitioners, Coal Tar Pitch can be more easily obtained by the "cut-back" method, by which all the oils are distilled out and some distillates such as creosote or anthracite are added back according to the desired proportions.

6. According to the petitioners, all the Coal Tar Pitch imported by them was obtained by the cut-method, which is categorised under Heading 2708.11 of the Central Excise Tariff and for which the duty payable is at a flat rate of Rs. 100/- per metric tonne.

7. It appears that on 8th June, 1988, the petitioner Company imported a consignment of Coal Tar Pitch and erroneously categorised the same under sub-heading 2708.19 and paid a higher countervailing duty for the same. It is the petitioners' case that they paid the higher rate of duty under protest and subsequently claimed and obtained refund of the difference between the higher and the lower rates prescribed under sub-headings 2708.11 and 2708.19.

8. According to the petitioners, they imported several other consignments of Coal Tar Pitch and claimed payment of countervailing duty at the lower rate. Such payment was provisionally accepted on production of certificates from the suppliers, and later at the instance of the Customs authorities from the manufacturers, that the Coal Tar Pitch had been produced by blending coal tar with coal tar distillates, and upon the petitioner Company furnishing security by way of Bank Guarantees for the difference between the higher and the lower rates of duty.

9. It is also the petitioners' case that samples taken by the Customs authorities were tested in the Customs laboratories, but as the process of manufacture could not be ascertained, they insisted on production by the petitioners of relevant literature from the foreign manufacturers, which spelt out the process of manufacture.

10. It was pointed out on behalf of the petitioners, that the foreign manufacturers were reluctant to reveal their manufacturing process, which was part of their trade secrets. The petitioners had, therefore, to enter into a good deal of correspondence to explain to the foreign manufacturers to let them have some kind of literature along the lines proposed, which would satisfy the

Customs authorities that the Coal Tar Pitch in question was of the type covered by sub-heading No. 2708.11 and not 2708.19.

11. According to the petitioners, the Customs authorities were not satisfied with the said Certificates and literature produced on behalf of the petitioners, and on the basis of information alleged to have been obtained by them, they conducted searches at the premises of the petitioner Company as also the premises of the Indian Agents of the foreign suppliers, and seized various documents from such premises. In addition, Officers of the petitioner Company and the Agents of the foreign suppliers were also interrogated by the Customs officials.

12. It appears that, thereafter, the Collector of Customs, Calcutta, sent a notice to the petitioner Company dated 23rd April, 1992, asking it to show cause, inter alia, as to why the consignments of Coal Tar Pitch imported by the petitioner Company should not be finally assessed at the higher rate of duty, as prescribed under sub-heading 2708.19, and why the duty refunded to the petitioner Company should not be recovered by enforcing the Bank Guarantees given by it, and why fines and penalties under the provisions of Customs Act, 1962, should not be imposed on the petitioner Company.

13. The notice to show cause, which has been made Annexure "A" to the writ petition, appears to have been issued in terms of Sections 28 and 112 of the Customs Act, 1962, and forms the subject matter of challenge in the writ petition, along with the proceedings initiated on the basis thereof.

14. Appearing in support of the writ petition, Mr. P.P. Ginwala, learned Senior Counsel, submitted that both the notice to show cause and the proceedings initiated thereon were misconceived, inasmuch as, nowhere in the show cause notice, which runs to 140 pages, is there any finding that from the enquiry conducted it had been established that the Coal Tar Pitch imported by the petitioner Company had been manufactured by any process other than by blending Coal Tar with creosote oil or other coal tar distillates.

15. Mr. Ginwala submitted that consequently there was no foundation for the issuance of the impugned show cause notice, which did not make out any case for proceeding either u/s 28 or Section 112 of the Customs Act, 1962, and the petitioner Company and its officers should not be subjected to unnecessary harassment by the continuance of the impugned proceedings.

16. Mr. Ginwala also urged that the onus of proving that the imported materials were different from that categorised by the petitioner Company, was on the Customs authorities, and such burden could not be shifted to the petitioners, and in the absence of such burden having been discharged by the Customs authorities, as would be evident from the show cause notice itself, both the notice to show cause and the impugned proceedings initiated on the basis thereof, were liable to be quashed.

17. In support of his aforesaid contention, Mr. Ginwala firstly referred to and

relied upon Bench decision of the Bombay High Court in the case of Kirloskar Oil Engines Ltd. Vs. Union of India, , wherein while considering the question of classification of goods, it was held by their Lordships that the burden to establish classification of goods under a particular item was on the Department.

18. Mr. Ginwala also referred to a decision of the Supreme Court in the case of Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. G.S. Pai and Co., , wherein while considering certain entries in the Kerala General Sales Tax Act, 1963, the Hon''ble Supreme Court observed that for the purposes of taxation, the burden of proving whether G.I. Pipes fell within the description of "sanitary fittings" was on the Revenue authorities, since it was their contention it fell within description and was, therefore, liable to tax at a higher rate than if it did not.

19. Mr. Ginwala then urged that the language of the notice to show cause clearly reveals that the Customs authorities had prejudged the matter and had already made up their minds that the petitioners were guilty of the offences with which they had been charged, so as to preclude the possibility of a fair adjudication. Mr. Ginwala urged that the impugned notice to show cause and the proceedings initiated on the basis thereof were liable to be quashed.

20. Opposing the writ application on behalf of the Customs authorities, Mr. Rathin Das, learned Senior Advocate, firstly contended that the writ application was premature, since only a notice to show cause had been issued to enable the petitioners to explain the method used for manufacture of the imported Coal Tar Pitch in order to substantiate their stand that the said goods are to be categorised under sub-heading 2708.11 and not sub-heading 2708.19, for the purpose of payment of countervailing duty.

21. Mr. Das contended that it was not as if the matter had already been decided, but since certain suspicions had arisen regarding the process of manufacture of the aforesaid goods, an opportunity was being given to the petitioners to explain the matter before any further action was taken by the Department.

22. Mr. Das then urged that, although, it had been argued on behalf of the petitioners that the Customs authorities had failed to discharge their onus of proving that the imported goods had been manufactured by any process other than the cut-back method, such a submission was premature, since the Customs authorities would discharge such onus during the adjudication before the Collector of Customs, Calcutta.

23. Referring to the decision of the Bombay High Court in the case of Kirloskar Oil Engines Ltd. (supra), cited by Mr. Ginwala, Mr. Das urged that the said judgment, in fact, supported his aforesaid submission. Mr. Das pointed out that in the said case certain orders had been passed by the Assistant Collector, Central Excise, Pune, regarding classifications of certain kinds of washers and bushes as bearings. An appeal was preferred against such adjudication before the Collector of Central Excise (Appeals), Bombay, who confirmed the order of

the Assistant Collector, and it was the order of the Appellate Authority which was challenged under Article 226 of the Constitution.

24. Mr. Das urged that the writ petitioners should also be directed to participate in the adjudication before the Collector of Customs, Calcutta, and only after certain definite findings were arrived at, could the matter be considered by this Court in exercise of its writ jurisdiction.

25. To further emphasise his aforesaid contention, Mr. Das referred to the Bench decision of this Court in the case of I.T.C. Ltd. Vs. Union of India (UOI), , wherein the "threshold theory" had been considered in detail. Referring to the observations made by the Division Bench, Mr. Das pointed out that it had been clearly explained that if a prima facie case is made out in the show cause notice, it is for the adjudicating authority to finally decide all the questions, including questions of fact, and it was not for the High Court in its writ jurisdiction to embark on an enquiry about the validity or correctness of the facts alleged in the show cause notice.

26. Mr. Das then submitted that information had been received by the Customs authorities in May, 1990, that the writ petitioner Company was evading payment of substantial amounts of additional duty on Coal Tar Pitch in importation and had for the said purpose entered into a conspiracy with the foreign suppliers in fabricating documents and certificates regarding the process of manufacture of the said goods. Mr. Das contended that a search and seizure conducted in the offices of the writ petitioner Company and the offices of the Agents of the foreign suppliers had revealed incriminating documents to show that in order to pass off the imported Coal Tar Pitch as having been manufactured by the "cut-back" method, the petitioner Company had written to the foreign suppliers, indicating the very wording in which the certificates relating to the manufacturing process were to be given. Mr. Das submitted that certificates more or less identically worded, as desired and indicated by the petitioner Company, had been provided by the foreign suppliers, both German and Japanese.

27. Mr. Das, however, stated in his usual fairness that the foreign suppliers of the petitioner Company, were all concerns of repute.

28. Mr. Das submitted that the seized documents gave rise to a suspicion that the writ petitioner Company had tried to evade payment of countervailing duty at the higher rate by passing off the imported consignments of Coal Tar Pitch as having been manufactured by the "cut-back" process.

29. Mr. Das urged that since a prima facie case had been made out in the notice of show cause with regard to the above, the writ application was liable to be dismissed with a direction upon the writ petitioners to participate in the adjudication proceedings before the Collector of Customs, Calcutta.

30. In order to arrive at a decision in this case, I have carefully gone through the notice to show cause which forms the foundation of the submissions made both

on behalf of the petitioners as well as the respondents. While on behalf of the writ petitioners it has been submitted that the said notice does not make out any case against the petitioners and was, therefore, liable to be quashed along with the proceedings initiated on the basis thereof, on behalf of the Customs authorities it has been urged that a prima facie case has been made out in the notice for adjudication, and such adjudication should be allowed to continue to its logical conclusion.

31. Although, various materials have been disclosed and referred to in the show cause notice, no positive conclusion has been arrived at by the Customs authorities regarding the manufacturing process of the Coal Tar Pitch imported by the petitioner Company. In fact, at page 5 of the said notice, it has been admitted that the Chemical Laboratory, Customs House, had not been able to establish as to whether the Coal Tar Pitch imported by the petitioner Company had been manufactured by the "straight run" method or by the "cutback" method.

32. The test certificate from the National Test House at page 597 of the writ petitioners, which was relied upon by Mr. Das, has to be looked upon with caution, since the seal of the sample sent for testing was in a broken condition and the sample material could not be co-related with any of the consignments referred to in the notice itself.

33. While some amount of suspicion has been generated in the show cause notice, which runs into several pages, there is no positive evidence of any kind to establish that the Coal Tar Pitch in question had not been manufactured by the "cut-back" method. On the other hand, there are the certificates granted by the foreign suppliers which go to show that the Coal Tar Pitch supplied to the petitioner Company had, in fact, been manufactured by the "cut-back" method.

34. The law is quite clear on the point that if the Revenue authorities wish to impose a higher rate of duty or tax by classifying a particular product in a particular way, the onus is on them to prove that such product should be so classified. The Hon"ble Supreme Court has clearly spelt out the legal position in this regard in the case of Deputy Commissioner of Sales Tax (supra), cited by Mr. Ginwala.

35. Even if the adjudication is allowed to continue/ it would be an exercise in futility in the absence of any positive and conclusive proof in the hands of the Customs authorities regarding the mode of manufacture of the Coal Tar Pitch imported by the petitioner Company. Since it will not be possible for the petitioner Company to establish that the Coal Tar Pitch had been manufactured by the cut-back process, the show cause notice and the proceedings initiated on the basis thereof, appear to be in the nature of a roving enquiry to procure evidence, which the Customs authorities do not appear to have in their possession.

36. Mr. Das's contention that the Customs authorities would discharge their onus of proving that the Coal Tar Pitch in question had not been obtained by the cut-

back method, at the time of adjudication, cannot be accepted in the absence of any positive assertion anywhere in the show cause notice that the said Coal Tar Pitch had been manufactured by the "straight run" method and not by the "cut-back" method.

37. The decision in the case of I.T.C. Ltd. v. Union of India (supra) cited by Mr. Das, does not appear to be of much assistance to the respondents, but in a way supports the case of the petitioners. Explaining the threshold theory the Division Bench observed that a show cause notice can be challenged before the Writ Court only on the ground that even if the facts set out therein are assumed to be correct, no case had been made out against the petitioner. It goes without saying that if a prima facie case is made out in the show cause notice, it is for the adjudicating authority to finally decide the various issues contained in such notice.

38. In this case, except for creating an aura of suspicion, no prima facie case has been made out in the show cause notice, which as mentioned before runs into several pages, that the writ petitioners had misrepresented the manufacturing process of the Coal Tar Pitch imported by them to get the benefit of a lower rate of duty or tax.

39. Having regard to the view I have taken, it is not really necessary to go into the other question raised by Mr. Ginwala that the matter had been prejudged by the Customs authorities, though, there is sufficient material in the show cause notice in support of Mr. Ginwala's contention.

40. The writ petition, therefore, succeeds and is allowed. The impugned notice to show cause dated 23rd April, 1992, being Annexure "A" to the writ petition, and the proceedings initiated on the basis thereof, are hereby quashed.

41. There will be no order as to costs.

42. On the prayer made on behalf of the respondents, there will be a stay of this order for a period of four weeks from date.

43. All are to act on a xerox signed copy of this judgment and order on the usual undertaking.