

(1996) 01 AHC CK 0032

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 1102 of 1995

Hindalco Industries Ltd.

APPELLANT

Vs

Commissioner of C. Excise

RESPONDENT

Date of Decision : 10-01-1996

Acts Referred:

Central Excise Rules, 1944 — Rule 173C, 173G(6), 47, 9

Central Excises and Salt Act, 1944 — Section 11A, 11A(1), 4, 4(1)

Citation : (1996) 83 ELT 508

Hon'ble Judges : Om Prakash, J;M. Katju, J

Bench : Division Bench

Judgement

Om Prakash, J.—The petitioner - a Company incorporated under the Companies Act, 1956 carrying on business of manufacture of Aluminium and its products, seeks quashing of the impugned show cause notice dated 30-6-1995 (Annexure "2" to the writ petition). By the said notice, the petitioner was called upon to show cause within thirty days from the date of its receipt as to why a sum of Rs. 45,98,05,073.38p. be not recovered from it under Sub-section (1) of Section 11A of the Central Excises and Salt Act, 1944 (briefly, the Act) and why penalty should not be imposed upon it under Rule 173C of the Central Excise Rules, 1944 (for short, the Rules) for contravening the provisions of the various rules.

2. The contention of the petitioner is that by the impugned show cause Notice, respondent No. 1 has called upon the petitioner to furnish wholly irrelevant details and that the notice is based on wholly irrelevant considerations. It is contended that u/s 4 of the Act which is a charging section, the duty of excise is chargeable on excisable goods with reference to value and that such value under Clause (a) of Sub-section (1) of Section 4 shall subject to the other provisions of this section be deemed to be the normal price thereof, that is to say, the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal, where the buyer is not a related person and the price is the sole consideration for the sale. Referring to Section 4, learned counsel for the petitioner urged that the excise authorities

to levy excise duty can inquire into the normal price of the goods cleared by the petitioner and that all other inquiries by means of the impugned show cause notice are irrelevant, baseless and arbitrary.

3. No doubt, excise duty is chargeable on any excisable goods with reference to value thereof which under Clause (a) of Sub-section (1) of Section 4 of the Act shall be deemed to be the normal price thereof, that is, the price at which such goods are ordinarily sold by the assessee to a buyer in the course of a wholesale trade. In nutshell, excise duty will be charged on wholesale price of the goods cleared. For levying the excise duty, the excise authorities are required to determine as to whether a given assessee has truly and correctly disclosed the goods which have been cleared and the wholesale price thereof.

4. In para 2 of the impugned notice, it is stated that under Rule 173C of the Rules, the manufacturer is required to submit a monthly return of excisable goods manufactured and cleared by him. By means of RT-12 returns are required to be filed after the close of each month with the proper officer showing the quantity of excisable goods manufactured or received under bond during the month, the quantity used within the factory for a manufacture of other commodity, the quantity removed on payment of duty from the place or premises specified under Rule 9 or from the Store Room or other place of storage approved by the Commissioner under Rule 47, duty paid on such quantity and the details regarding quantities removed on payment of duty without payment of duty for export or otherwise. The RT-12 returns filed by HINDALCO during the year 1991 were summarised in respect of Aluminium and its products and they were produced before the respondents.

5. In para 3 of the impugned notice, it is stated that under the provisions of Rule 173G(6) of the Rules, every assessee on demand has to produce the Central Excise Officer, the Cost Audit Reports. The comparative statement of quantities sold as per the Cost Audit Reports and the quantities cleared as per RT-12 returns were supplied to the respondents. Para 4 of the impugned notice states :

"It appears from the comparison of quantities shown in Cost Audit Report for the year 1990-91 with clearances as given in RT-12 that HINDALCO has cleared a quantity of 50,7888.242 M.T. of ingots whereas the quantities cleared as per RT-12 are 50,768.213. It appears that a differential quantity of 20,079 M.T. of Ingots have not been accounted for in Central Excise Records and RT-12 shows a lower quantity of clearance in respect of ingots. Similarly, the quantities of Aluminium ingots rolled products and extrusions, exported as given in the Cost Audit Report 1990-91 were compared with RT-12 Returns. It appears that in respect of Aluminium ingots, whereas a quantity of 2516.188 M.T. was shown as exported in RT-12 Returns, a quantity of 2529.994, .M.T was shown in proforma "D-I" of Cost Audit Report, 1990-91. Therefore, a quantity of 13,756 M.T. of Aluminium ingots have been exported in excess of quantity shown in Central Excise Records. Similarly, 1077.199 M.T. Rolled products have been shown as exported in RT-12 Return. Whereas, the Cost Audit Report shows export of only

960.265 M.T." Therefore, 116.934 , M. T. of rolled products appears to have been removed without payment of Central Excise Duties. The extrusions have been shown as exported in excess of RT-12 by 48.558 M.T. As no duty is paid by HINDALCO in respect of quantities meant for export, the duty is recoverable under the provisions of Proviso to Section 11A of the Act in respect of excess quantities of Aluminium products removed from the factory as goods for export".

(emphasis supplied).

6. From the averments made in Para 4 of the impugned notice, it is clear that the allegation against the petitioner is that duty of excise could not be correctly levied upon and was not correctly paid by the petitioner because (i) lesser quantity of ingots was shown to have been cleared as per RT-12 Returns; (ii) 13.756 M.T. of Aluminium ingots had been exported in excess without showing them in Central Excise Records and (iii) that no duty was paid by the petitioner in respect of the quantity meant for export. If this factual position is correct, then the provisions of Section 11A of the Act will clearly attract.

7. In para 5 of the impugned notice, it is stated that from the perusal of the Cost Audit Report for the year 1990-91, the ratio of production of Aluminium from Alumina is 2 : 1 M.T. that is, 2 M.T. of Alumina would produce 1 M.T. of Alumina. From the Cost Audit Report, Proforma D-I, it appears that the petitioner had used 2,39,952.238 plus 31,553.075 M.T. of Aluminium from its own source and from outside; total quantity being 2,71,505.313 M.T. of Alumina. Working out the production in the ratio of 2 : 1 M.T., the respondents concluded that quantity of 1,35,752.656 M.T. of Aluminium would have been produced from the total consumption of Alumina but the petitioner showed the production of only 133,251.582 M.T. of Aluminium. An inference was, therefore, drawn that the petitioner suppressed the production of 2501.074 M.T. of Aluminium Ingots and that was removed surreptitiously without recording the same in the Central Excise Records with intent to evade payment of excise duty.

8. At the first blush, the argument of learned counsel for the petitioner that the excise authorities are not concerned with the quantum of production appears to be very attractive but from the inference drawn by respondent No. 1, it appears that the inquiry as to the production is relevant to levy correct duty.

9. In para 9 of the notice, respondent No. 1 pointed out the discrepancy in the opening and closing balance. An inference was drawn that a quantity of 745 M.T. remained unaccounted for. Therefore, an inference was drawn that the petitioner cleared 745 M.T. of Aluminium metals clandestinely without payment of duty.

10. In paras 14 to 16 of the notice, it is averred that cost of production has been underestimated. It is incomprehensible as to what is the relevancy of the cost of production being underestimated. The excise authorities have nothing to do with the cost of production. The cost of production may be anything, since duty u/s 4 of the Act is leviable on the wholesale price of the goods cleared.

11. Similarly in para 17 of the notice, respondent No. 1 concluded that the petitioner had suppressed the assessable value of Aluminium Ingots and other products of Aluminium by suppressing the various elements of assessable value. We fail to understand as to how the excise authorities are concerned with the disclosure of expenditure incurred in production and the cost of raw materials.

12. We are of the view that no inquiry can be made by the respondents with regard to the aspects raised in paras 14 to 16 of the impugned notice, but it is open to them to investigate into the averments made in the paragraphs preceding to paragraph 14.

13. The petition is, therefore, disposed of finally with the observations that if a reply is submitted by the petitioner in regard to the averments made upto para 13 of the impugned notice within thirty days from today, then the same shall be considered and decided by a speaking order by Respondent No. 1 within thirty days from the date of receipt of such reply after giving an opportunity of being heard to the petitioner. No recovery pursuant to the impugned notice dated 30th June, 1995 (Annexure "2" to the writ petition) shall be made by the respondents from the petitioner for a period of two months.

14. Also, the counsel for the petitioner argued that impugned show cause notice is barred by limitation, inasmuch as the limitation of six months as stated in Sub-section (1) of Section 11A of the Act expired long before the date of the impugned notice. It appears that learned counsel for the petitioner lost sight of the proviso to Sub-section (1) of Section 11A which states that where any duty of excise has not been levied or paid by reason of fraud, collusion or any wilful mis-statement or suppression of facts or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty by such person or his agent, limitation will be five years and not six months. Against the petitioner, wilful mis-statement, suppression of facts etc. have been pleaded and, therefore, the case is not prima facie, barred by limitation. It is, of course, open to the petitioner to contend before the respondent concerned that in fact there was no fraud, collusion or wilful mis-statement or suppression of facts.

15. If the petitioner fails to submit a reply as aforesaid, then the stay order will stand vacated.

16. A copy of the order will be issued to the parties on payment of usual charges within two days.