
(1994) 01 RAJ CK 0046

In the Rajasthan High Court

Case No : Civil Writ Petition No. 1531 of 1982

Hindustan Development Corporation Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 24-01-1994

Acts Referred:

Central Excise Rules, 1944 — Rule 8, 8(1)

Central Excises and Salt Act, 1944 — Section 11A, 2, 3, 4

Citation : (1995) 80 ELT 493 : (1994) 1 RLW 57 : (1994) 1 WLC 464 : (1994) 1 WLN 70

Hon'ble Judges : A.K. Mathur, J

Bench : Single Bench

Advocate : L.R. Mehta and Arun Bhansali, for the Appellant; P.P. Choudhary and S.S. Lal, for the Respondent

Final Decision : Allowed

Judgement

A.K. Mathur, J.—The petitioner by this writ petition has prayed that the impugned notices dated 23-11-1979, 22-5-1980, 20-2-1981 and 20-3-1982 (Annexs. 3,4,5 and 8 respectively) issued by the respondent No. 3 may be quashed and it may be declared that the respondents are not entitled to realise any duty from the petitioner on the basis of the value of rails supplied by the Railway Boards to the petitioner in respect of the period prior to 1-4-1981.

2. The petitioner is a limited company incorporated under the provisions of the Indian Companies Act, 1956 and its Head Office and registered office are at Calcutta. The petitioner owns an industrial unit known as General Engineering Works (G.E.W.) at Bharatpur and carrying on the business of manufacturing of railway points and crossings amongst other items. The railway points and crossings (Switchess and Crossings) are being excisable to central excise duty under Item No. 68 First Schedule (hereinafter referred to as "the Tariff") appended to the Central Excises and Salt Act, 1944 (hereinafter referred to as "the Act"). According to the contracts the Railway Board of the respondent No. 1

supplied to the petitioner rails free of cost for fabrication of the points and crossings. The rails are processed by fabrication or by process like cutting, chiselling, bending, curving, shaping etc. and they are then fitted with the help of nuts and bolts and other minor fittings to make them railway switches and crossings (points and crossings). Then, they are returned by the petitioner to the Railway Board. The points and crossings are rails and trains move over them and the difference in the use of the said items and the use of the ordinary rails is that they are used for changing the railway line when trains have to change rails at the station. The rails do not belong to the petitioner but they belong to the Railway Board and the petitioner merely carry out fabrication and/or processing and charge from the railway only fabrication charges in accordance with their job work done on these rails which are supplied by the Railway Board. The contract of the petitioner is a job contract for supply of points and crossings to the railways. It is alleged that in the course of their aforesaid fabrication except minor incidental materials and incidental components the value of which is included in the fabrication charges in accordance with the aforementioned contract. Thus, no new article known to the trade emerges after the rails supplied by the Railway Board are subjected to the aforementioned process by the petitioner. The Govt. of India in exercise of the powers conferred upon it under Rule 8 of the Central Excise Rules, 1944 (referred to hereinafter as "the Rules") issued a Notification No. 119/75, dated 30-4-1975 envisaging payment of excise duty only on the charges for the job work done and not on the total value of the articles when the articles leave the factory of the job workers. The relevant notification is reproduced hereunder :-

"Exemption to goods produced on job work basis. - In exercise of the powers conferred by sub-rule (1) of rule 8 of the Central Excise Rules, 1944, the Central Government hereby exempts goods falling under Item No. 68 of the First Schedule to the Central Excises and Salt Act, 1944 (1 of 1944), manufactured in a factory as a job work from so much of the duty of excise leviable thereon as is in excess of the duty calculated on the basis of the amount charged for the job work.

Explanation. - For the purposes of this notification, the expression "job work" shall mean such items of work where an article intended to undergo manufacturing process is supplied to the job worker and that article is returned by the job worker to the supplier, after the article has undergone the intended manufacturing process, on charging only for the job work done by him."

3. The petitioner submits that he is entitled to the benefit of the above notification. The Central Excise authorities were giving the benefit of this exemption and realising central excise duty from the petitioner under Item No. 68 of the Tariff on the basis of the job charges and suddenly on 21-11-1979 the Superintendent, Central Excise, Bharatpur conveyed to the petitioner that he has been directed from the Headquarters, Central Excise, Jaipur to convey that the exemption under Notification No. 119/75, dated 30-4-1975 was not applicable to

the petitioner and the assessment of duty would have to be made on the value including the value of the rails. In pursuance of this direction, the Superintendent, Central Excise, Bharatpur issued a show-cause notice to the petitioner requiring them to show-cause as to why he should not be required to pay the amount of duty specified therein. The particulars of the show-cause notice have been reproduced by the petitioner at page 6 of the writ petition which read as under :-

PARTICULARS	OF	SHOW	CAUSE	NOTICE
-----				Show
cause notice No. & Period to which short Amount of short levy to date levy relates		be		adjusted.
-----				1. C.E.
20/GEW/68/79/ 1-3-1975 to 23-11-1979		Amt. of differential duty	2202, dated 23-11-1979 to be determined by us on the basis of the causes shown in SCH	
2. C.E. 20/GEW/11/79/ 24-11-1979 to 20-5-1980 -do- 876, dated 20-5-1980				
3. C.E. 20/GEW/63/79/ 23-5-1980 to 31-1-1981 -do- 219, dated 20-2-1981				

4. Copies of these notices have been placed on the record as Annexures 3, 4 and 5 respectively. Therefore, by this show cause notice the petitioner has been called upon to pay the difference in the duty amount to be determined by the Assistant Collector. The petitioner submitted a reply to all these notices within the time prescribed. The Assistant Collector, Central Excise, Jaipur granted a personal hearing to the petitioner and the last hearing took place on 22-5-1981. The petitioner's contention was that the petitioner is not entitled to pay excise duty in view of the aforesaid notification and in support thereof he heavily relied upon the judgment of the Gujarat High Court in the case of Anup Engineering Ltd., Ahmedabad v. Union of India and Ors.. It is alleged that in spite of the reply and arguments submitted by the petitioner the Assistant Collector did not decide the issue and a fresh demand was raised by the Superintendent to pay the difference in the duty to the extent of Rs. 39,09,184/-for the period from 14-3-1978 to 15-8-1980 (Annex. 8). A detailed reply was also submitted by the petitioner to this demand and it was also contended that the duty is time-barred by virtue of Section 11A of the Act. But these objections were not decided. Therefore, the petitioner has approached this Court by filing the present writ petition.

5. The principal submission of the learned counsel for the petitioner is that the Assistant Collector, Central Excise has still not determined this question and still he is raising the demand. Secondly, it is submitted that the Notification No. 119/75-C.E., dated 30-4-1975 squarely covers the case of the petitioner and the petitioner is not liable to pay the excise duty on the total value of the article and he is liable to pay excise duty on the basis of the job work done. It is also contended that according to Section 11A a large part of the claim is beyond the period of six months and it is not covered by proviso to Section 11A of the Act

whereby the period of 5 years has been provided in case any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud or any wilful misstatement 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.

6. A reply has been filed by the respondents and the respondents have taken the position that the petitioner is not entitled to the benefit of the aforesaid notification for the reason that the goods which are produced by the petitioner is of different identity and the article does not remain the same. A plea has also been raised that the respondents have not decided the matter so far and, therefore, the writ petition is premature. The main thrust of the respondents is that the petitioner company also manufactures spikes, dog spikes, fish plates, slide chairs, C.I. castings, blocks, nut, bolts, washers etc. which are fitted according to different designs supplied by Railway according to requirement of these points, crossings and switches. It does not tantamount to minor operation of manufacture but nearly 25 items are being manufactured and fitted to make the complete product. The use of rails is also different since processed rails with different fittings are fixed in a manner that trains change track on speed without de-railment and loss of speed. So far as the contention regarding limitation u/s 11A of the Act is concerned, a plea has been taken by the respondents that the petitioner is guilty of suppressing facts from the department. Therefore, the petitioner is not entitled to the benefit of limitation.

7. I have heard the learned counsel for the parties and perused the record. As a matter of fact, the petitioner was driven to file the present writ petition only for the reason that the Assistant Collector should be directed to determine this question factually as to whether the petitioner is entitled to the benefit of the Notification No. 119/75 or not but instead of deciding the matter, he raised a fresh demand. I would have resorted to the course of remanding the case back to the Assistant Collector to decide the matter factually but Mr. Mehta, learned counsel for the petitioner submitted that it would be driving the petitioner once again from pillar to post after a lapse of about 12 years and the petitioner has already waited for the decision of the Assistant Collector for all this period and it will not be a sound exercise of power to remand the matter back for determination of the question when the question is so clear and on the basis of admitted facts the matter can be determined by this Court whether the notification in question is applicable in the present case or not. I think the submission of Mr. Mehta, learned counsel for the petitioner deserves to be accepted as it will not be a sound exercise of discretion to remand the case back to the Assistant Collector Customs for deciding the question which the Assistant Collector ought to have decided long back. Therefore, I over-rule the objection of the respondents.

8. It is an admitted fact that the petitioner has been supplied the rails on which the petitioner has to do certain job work i.e. fabrication or processing like

cutting, chiselling, bending, curving, shaping etc. and after that these rails are returned back to the Railways for their intended purpose. The question is whether after preparing these rails which are being supplied back to the Railways the petitioner is liable to pay the excise duty on the total value of the goods or only on the charges for the job work done by him. It is undisputed fact that the rails are being supplied by the Railway Board to the petitioner and he manufactures those rails by carrying out manufacturing process and converts it into points and crossings and thereafter returned it back to the Railways for the intended use for which they are again put by the railways. The points and crossings are rails and trains move over them. These rails are used by the railways at the approaching of the station for changing the railway track without losing speed and without fear of derailment. Therefore, the rails are being supplied by the Railways to the petitioner for only doing certain processing job and the same are returned to the Railways back by the petitioner. The respondents in their reply have submitted that the petitioner has to add certain new things and the rails acquire a new commercial name like points and crossings/switches. But the basic question is whether those rails which are being supplied by the Railway Board to the petitioner do they totally undergo a change and a new identity emerges or not. From the factual averments made from both the sides it emerges that the rails remained the rails only and they only undergo the small process by which the trains can negotiate at the station conveniently without derailment and loss of speed at the time of changing the track. Therefore, it appears that these rails which are being supplied by the Railway Board remain the same article with a small modification. Thus, from these factual averments we have to see that whether the notification is applicable in the present case or not. Each case has to be decided on its own facts. Therefore, we have to see that whether in these facts the present notification is applicable or not.

9. Now, in the back-ground of these facts we have to see as to what is the purport of this exemption notification. Sections 3 and 4 of the Act are charging sections. Section 3 lays down that there shall be levied and collected in such manner as may be prescribed duties of excise on all excisable goods other than salt which are produced or manufactured in India and a duty on salt manufactured in, or imported by land into, any part of India as, and at the rates, set forth in the First Schedule. Section 4 says that the valuation of excisable goods for the purpose of charging of duty of excise which means 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 related person and the price is the sole consideration for the sale. Therefore, so far as these Sections 3 and 4 of the Act are concerned, if we go by those sections then the manufacturer is liable to pay the excise duty on the whole of the goods which are despatched from its factory but at the same time the Government has been given a power to issue certain exemptions and in the purported exercise of power under Rule 8 of the

Central Excise Rules, 1944 the Central Government has issued an exemption notification as reproduced above. According to the aforesaid notification which clearly says that the goods which are falling under Item No. 68 of the Tariff and they are manufactured in a factory as a job work the duty is payable on the basis of the amount charged for the job work. The job work has been defined in the explanation given in this notification which says that the job work shall mean such items of work where an article intended to undergo manufacturing process is supplied to the job worker and that article is returned by job worker to the supplier, after the article has undergone the intended manufacturing process on charging only for the job work done by him. There are two important things which have to be seen i.e. first, that the article has undergone the intended manufacturing process and secondly after undergoing the intended manufacturing process the article is returned by the job worker to the supplier. These two important factors have to be kept in view. The explanation nowhere lays down that if the article has acquired a different identity then it will be ceased to be a job work. The plain and simple interpretation of this explanation is that the article is to be supplied by the supplier and the job worker has to supply that article back to the supplier after the article has undergone the intended manufacturing process. Whether it will acquire a different commodity and it will be known as different article in the commercial market or it will emerge as a new article. All these connotations are not in the explanation but they are artificially placed by the authority to frustrate the intended purpose for which this exemption notification has been issued. In fact, if this was the intention that after the job work is done the article should be fully chargeable then there was no purpose of issuing this exemption notification at all. It appears that the authorities after due application of mind realising the hardship to such job workers issued this notification so as to give relief to such job workers and the authorities which are now interpreting the notification by putting a construction which is not borne out in this explanation and are importing some thing else which is not there in the explanation and thereby they are frustrating the very purpose for which this notification has been issued. If a commodity acquires a new nomenclature and a new commercial name or identity or a new intended purpose it has to be put then the authorities would not have issued this notification at all. The bona fide purpose with which this notification has been issued is to grant a relief to such job workers but the authorities by putting their own interpretation want to frustrate the propose of this notification. In the present background I am satisfied that the petitioner is right when it contends that the petitioner is entitled to pay duty on the charges of job work done by it and not on the whole of the goods manufactured. In this connection, learned counsel for the petitioner has invited my attention to a decision i.e. Anup Engineering Ltd Ahmedabad and Others Vs. Union of India and Others, This was a first case interpreting the Notification No. 119/75 by the Gujarat High Court and the Division Bench of that Court has taken the view that this notification is fully applicable in such job work. It was observed as under :-

"7. It is clear, that, by this Notification, goods falling under Item 68 of the First Schedule manufactured in a factory as a job work are exempted from excise duty, except to the extent of the duty on charges for the job work. The explanation set out in the Notification makes clear what is meant by "job work" and job work, in the context of this Notification means such items of work where the article intended to undergo manufacturing process is supplied to the job worker and that article is returned by the job worker to the supplier after the article has undergone the intended manufacturing process, charging only for the job work done by him. It is clear therefore, that the article supplied by the customer has to undergo manufacturing process as intended. It is obvious, in the context of the excise law, that, unless a new article known to trade emerges after the manufacturing process is completed, excise duty cannot be levied at all. That is the very basis of taxation under the excise law. In order to exempt job workers from payment of duty except to the extent of duty on the job work charges," this Explanation to the Notification makes it clear that the article which undergoes manufacturing process at the hands of the job worker, must be supplied by the customer and the only thing which the job worker has to do is to subject that article supplied by the customer to the intended manufacturing process. The final result after the manufacturing process is completed has to be returned to the customer and the job worker only charges for the job work done by him. Under these circumstances, it is clear that, though excise duty would be otherwise leviable on the value of the article as it leaves the job worker's factory by virtue of the Notification, excise duty has to be paid only on the charges for the job work and not on the total value of the articles when it leaves the factory of the job worker. No other meaning is possible on the wording on this particular Notification."

10. This judgment has been further followed in the case of Associated Pigments Limited Vs. Collector of Central Excise and Others, and in that case, it was found that the conversion of pure lead or lead ingots into suboxide and lead monoxide does not amount to manufacture as envisaged by Section 2(f) of the Central Excise Act. Therefore, they are entitled to exemption under Notification No. 119/75-C.E., dated 30-4-1975. In that case the decision given by the Gujarat High Court in the case of Anup Engineering Co. (supra) was relied upon and the principle laid down in that case was accepted.

11. Similarly, in the case of Madura Coats Limited Vs. Collector of Central Excise, the Calcutta High Court accepted the same principle as held in the case of Anup Engineering Co. (supra) and has observed as under :-

"Under Notification No. 119/75, it is obvious that the manufacturer is entitled to claim relief for the job work done even though the raw-material supplied by his customer has undergone some change at his hands and has become a new Product."

12. In Noble Paints and Varnish Company Pvt. Ltd. Vs. Union of India and another, the Bombay High Court has taken a similar view that in case of job work

even change in the nomenclature of the raw material at the hands of the job worker and a new article is emerged then too also the benefit of this notification will be made applicable. In this case the petitioners received from M/s. Coates of India Ltd. pigments, oils and toners and they subjected them to a manufacturing process. The rotary news ink which was so manufactured was returned by the petitioners to M/s. Coates India Ltd. In this context the Bombay High Court has also taken the view that the benefit of this notification will be applicable to the petitioners.

13. In Precision Telecom Products Vs. Superintendent of Central Excise and Others, the Karnataka High Court has also taken the same view relating to this notification. In this case, the petitioner obtained raw material from I.T.I, and only collecting job charges on the same. In that context, their Lordship of the Karnataka High Court have held that the cost of raw materials supplied by the I.T.I, on job work basis but utilised in the intended manufacturing process is not liable to excise duty under Item 68 of the Central Excise Tariff but exempted from payment of duty under the aforesaid notification.

14. Likewise, in the case of K.E.C. International Limited Vs. Union of India and another, the Bombay High Court has observed that the words "intended to undergo manufacturing process" must necessarily mean that an article is given to a job worker and it is so given for the purpose of subjecting that article to a manufacturing process. An article is not subjected to a manufacturing process unless the result is intended to be something different. It is, therefore, clear that the notification must apply to a factory which does job work for the purpose of manufacturing an article, the raw material for which is supplied to it by its own customers and accordingly it is held that the demand raised by the assessing authority is not correct. In this connection, the judgment given in the case of Anup Engineering Ltd. (supra) has been followed.

15. Therefore, the view which I have taken is substantially stands supported by the judgments of the various High Courts as quoted above.

16. Learned counsel for the respondents has invited my attention to a decision of this Court delivered by the Jaipur Bench in the case of Pratap Engineering Works Ltd. and Ors. v. Union of India and Ors., S.B. Civil Writ Petition No. 327/81, decided on 30-4-1992. I am informed that a special appeal has been preferred against this judgment. In this case, certain raw materials were supplied by M/s. National Engineering Industries Ltd., Jaipur, namely, steel tubes and strips for conversion on job basis into rollers, cages and races etc. and it was not disputed that they fall under Item 68 of the Tariff. The question was whether the same article which has been received by the manufacturer i.e. the raw material should be returned to the supplier and should not lose its identity and should not be different after the job work. The learned Single Judge, after considering the important provisions of the Act and referring to various judgments has taken the view that since they acquire different identity, therefore, they are not entitled to the benefit of exemption. I need not comment on this judgment as the same is

pending before the Division Bench. However, the view which I have taken stands supported by the judgments of various High Courts of the country.

17. Both the learned counsel have also invited my attention to two decisions of the Hon''ble Supreme Court delivered in the case of M/s. Burn Standard Company Ltd. and another Vs. Union of India and others, and M/s. Texmaco Ltd. Vs. Collector of Central Excise, Calcutta, in support of their respective contentions.

18. M/s. Burn Standard Company Ltd. (supra) was a case in which a simple question came up for interpretation regarding Sections 3 and 4 of the Act which I have already referred to above and in this case no reference was made to any notification tender which the exemption was sought. In that case, the question was where the manufacturer manufactured the railway wagons and supplied them to the Railways, he was liable to pay duty of excise on the normal value of the wagon which included the value of the free supply items like wheel-sets, axle boxes etc. supplied free of cost by the Railways to the manufacturer for getting them fitted in the wagons manufactured. The question was whether the petitioner is entitled to pay the excise duty on whole of the wagon including the items which were supplied by the Railways. Their Lordships of the Supreme Court after referring to the charging Sections 3 and 4 held that there is no provision in the charging sections for giving any rebate on these free supplied items and held that it hardly mattered how and in what manner the components of the wagon were procured by the manufacturer, so long as he was manufacturing and producing the goods called wagons, he was liable to pay duty of excise on the normal value of the wagon by virtue of Sections 3 and 4 of the Act. This case came up for consideration before their Lordships of the Supreme Court in a subsequent case i.e. M/s. Texmaco Ltd. (supra). In that case, the Notification No. 120/75-C.E., dated 30-4-1975 was pressed into service and in that case, M/s. Texmaco Ltd. pursuant to contracts entered into in this behalf with the Railway Administration fabricated and delivered to the Railways wagon bodies mounted on wheel-sets supplied by the Railways. The invoices raised by the appellant respecting these wagons reflected only the price of the wagon bodies without including the value of the wheel-sets on which the wagon bodies were mounted. The goods were cleared for purposes of excise duties on such invoice value. The Revenue raised demand for recovery of short levy and sought to recover the unpaid duty on the value of the wheels-sets also. The petitioner approached to the Tribunal and the Tribunal decided against the assessee and the assessee against this order approached the Hon''ble Supreme Court and sought to press into service the Notification No. 120/75, dated 30-4-1975 and submitted that in fact, the Central Government exempted duty on wheel-sets by virtue of this notification and the incumbent is not entitled to pay the excise duty on the wheel-sets which have been received from the Railways. In that context the relevant clause of the Notification No. 120/75, dated 30-4-1975 was pressed into service which reads as under :-

"The Central Government has exempted goods falling under Item No. 68 of the First Schedule to the Central Excises and Salt Act, 1944 (1 of 1944), cleared from the factory of manufacture, on sale from so much of the duty of excise leviable thereon as is in excess of the duty calculated on the basis of the invoice price (excluding duty and local taxes, if any, included in such price) charged by the manufacturer for the sale of such goods :

Provided that the aforesaid exemption shall be admissible only if -

(i) the manufacturer files with the Superintendent of Central Excise having jurisdiction a written declaration to the effect that he opts to avail of the said exemption:

(ii) and (iii) omitted as unnecessary.

(iv) the invoice price is not influenced by any commercial, financial or other relationship whether by contract or otherwise between the manufacturer or any person associated in business with the manufacturer and the buyer other than the relationship created by sale of the aforesaid goods :

(v) Omitted as unnecessary. Provided (Omitted as unnecessary)"

19. When this matter was argued before the Hon^{ble} Supreme Court the decision given in the case of Burn Standard Company Ltd. (supra) was referred to and in that context, their Lordships held as under :-

"Shri Subba Rao placed strong reliance on the pronouncement of this Court in Burn Standard Company Ltd. v. Union of India JT (1991) 3 108 : AIR 1991 SCW 1887 . On the contentions raised and argued in that case the judgment, if we may say so with great respect, is correct. The question of the effect of the exemption Notification No. 120/75-C.E. was not raised and argued in that case. That apart, the exemption Notification itself makes it clear that it does not apply or is attracted to every case automatically, but that the manufacturer should expressly opt for the benefit of the Notification. Since no such claim was made in that case, the decision therein is of no assistance to the revenue."

20. Therefore, the aforesaid judgment given in the case of Burn Standard Company Ltd. (supra) was distinguished by their Lordship - of the benefit under the Notification was not pressed into service. Therefore, the attempt on the part of the respondents to press into service that decision is of no avail primarily for the reason that the judgment has been explained by the Hon^{ble} Supreme Court in the subsequent judgment and secondly the issue involved in that case was Notification No. 120/75 and not 119/75, though both the notifications have been differently worded as is evident from both the notifications quoted above. But the intended purpose which appears from this notification is to grant certain exemptions to the manufacturer and that has to be construed in the context for which such exemption has been granted.

21. Therefore, I am of the opinion that the Notification No. 119/75-C.E., dated

30-4-1975 intended to give the benefit of exemption to such job workers and in the present case the rails which are being supplied by the Railway Board to the petitioner for converting them into points and crossings remain the same and, therefore, the petitioner assessee is entitled to the benefit of the aforesaid notification.

22. Since I have decided the basic issue in favour of the petitioner assessee I need not express my opinion regarding the limitation which has been pleaded by the petitioner for issuing the notices as contemplated in Section 11A of the Act.

23. In the result, I allow the writ petition and quash the notices and demand raised by the respondents against the petitioner.