
(2003) 04 MP CK 0111

In the Madhya Pradesh High Court

Case No : M.P. No's. 1000 and 1001 of 1990

Hindustan Electro Graphites Ltd. and Another

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 03-04-2003

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A

Citation : (2003) 4 MPLJ 68

Hon'ble Judges : Arun Mishra, J

Bench : Single Bench

Advocate : V.K. Tankha, with H.K. Upadhyay, for the Appellant; Indira Nair with Sandeep Aole, for the Respondent

Final Decision : Dismissed

Judgement

Arun Mishra, J.

Petitioner Hindustan Electro Graphites Ltd. is a company incorporated under the Companies Act, 1956 engaged in the business of manufacturing Graphite Electrodes and Nipples and Anodes at its factory situated at Mandideep, District Raisen in the State of M.P. Petitioners are challenging the show cause notice (Annexure A) dated 5-2-1990 in M.P. No. 1000/90 and show cause notice (Annexure A) dated 10-11-1989 in M.P. No. 1001/90.

In M.P. No. 1000/90 petitioner submits that the classification was approved by respondent No. 4 as per order dated 5-8-1977. Approval was also made earlier on other occasions. Petitioner submits that show cause notice dated 5-2-1990 issued by respondent No. 3 calling upon the petitioners to show cause to respondent No. 3 why the classification lists submitted by petitioner No. 1 between 13-3-1982 to 28-2-1986 should not be reviewed and the goods mentioned therein be re-classified under Tariff Item No. 67 which were being classified under Tariff Item No. 68. The show cause notice also states as to why differential duty be not demanded u/s 11A of the Central Excise and Salt Act,

1944. Petitioner submits that same issue with respect to the classification list from 1977 to 1983 was challenged in M.P. No. 2685/83 which was allowed by the Division Bench of this Court and as per order Annexure G passed on 31-8-1989. It was held that classification made in 1968 was proper and the show cause notice was quashed as barred by limitation and it was found not to be a case of the provisional classification made.

Petitioner submits that show cause notice issued in M.P. No. 1000/1990 takes into account some of notices which were subject matter of the above decision (Annexure G). The classification list submitted earlier by the petitioner was the subject matter of M.P. No. 2685/83 decided by Division Bench of this Court. Thus, petitioner submits that action is without jurisdiction and the demand made as per show cause notice is illegal and void as the Division Bench decision is squarely attracted to the show cause notice which is binding on the respondents. The purpose for which the electrodes are used is for generating electricity. Petitioner submits that out of 12 items enumerated in the show cause notice items Nos. 1, 4, 8, 9, 10 and 11 are actually various types of Graphite Scrap and items No. 2, 3, 5, 6, and 7 are various types of Graphite articles made out of Graphite Scrap. By no stretch of imagination the above articles could be classified under Tariff Item No. 67. Petitioner further contends that section 11A of the Act deals with short levy or non-payment of duties only. Section 11A therefore does not authorise or give any power to Excise Officer to re-open an assessment already concluded after following the procedure laid down in law. Section 11A of the Act, therefore, does not empower a Central Excise Officer to re-open an assessment on the ground that earlier classification lists have been wrongly approved. This is because Rule 173-B lays down a complete machinery as to how goods are to be classified. It is inherent in the procedure laid down in Rule 173-B that once a classification list has been approved it cannot be revised retrospectively. All what the excise officer can do is to propose a revision of the classification lists prospectively. The assessment completed cannot be opened. Thus, effort made as per show cause notice is bad in law. Hence, writ petition has been filed.

In M.P. No. 1001/90 challenge is made to the show cause notice (Annexure A) dated 10th November, 1989 issued by respondent No. 3. Petitioner submits that the petitioner No. 1 at its factory also manufactures Graphite Power Feeding Electrodes Graphite pressure electrodes, Graphite Circular Blocks and Graphite specialties like rods, Tubes, Plates etc. used for electric purposes. The said articles are classifiable under Chapter sub-heading No. 8545.00 of the said Tariff. Petitioner No. 1 company also manufactures Soderburg paste and Graphite specialties used for non electric purposes. The said articles are subjected to duty under chapter sub heading No. 3801.00 of the said Tariff.

A return has been filed by the respondents. The case of the respondents is that lumps, nipple rejects, baked electrodes, rejects/lumps, samples of graphite electrodes and nipples graphite specialties are rightly classifiable under sub

heading 8545.00 of the Central Excise Tariff Act, 1985 because the same are capable of being used for electrical purposes and the petitioner himself has contended that when the said goods are classified under sub-heading 8545.00 of the said Tariff. The submission of the petitioner are denied power feeding, electrodes, pressure electrodes, soderberg paste, graphite specialties and refractory blocks are used as machinery, equipment apparatus, tools or appliances in the graphitization furnace for better functioning of the furnace and are not input either under Rule 57A or notification No. 217/86 CE dated 2-4-1986. The respondents submit that soderberg paste and graphite specialists and articles of graphite are covered under sub-heading 8545.00 of the schedule to the Central Excise Tariff Act, 1985. Carbon electrodes, carbon brush, lamp carbons, battery carbons and other articles of graphite or other carbon with or without metal of a kind and for electrical purposes. It is submitted that the reject graphite electrodes, nipple reject etc, are capable of being used for the electrical purpose and as graphite electrodes.

The points raised are disputed and a conclusion has yet to be arrived at. The notice has been issued by respondent No. 3 which is within jurisdiction and within the powers vested in him to decide the issue. Due opportunity has been provided to the petitioner to present his case. The power feeding electrodes or pressure electrodes baked electrodes soderburg paste are used as tools/ machinery part for the functioning of graphitization furnace. Electrodes, baked electrodes and soderburg paste are classifiable under sub-heading 8545 of the schedule to the Central Excise Tariff Act, 1985. Refractory blocks are used as tool and for construction of furnace wall, for better functioning of the graphitization furnace. They are as a matter of fact used to become a part of the graphitization furnace and are replaced in cycles. These refractory blocks are not and cannot be treated as inputs for the manufacture of graphite electrodes. It is further submitted by the respondents that graphite specialties such as rods, tubes, trays, etc. are articles of graphite and are appropriately classifiable under sub-heading 8545 of the Central Excise Tariff Act, 1985.

It is further contended by the respondents that petitioner is having the alternative remedy of showing cause against the notice and take all possible pleas before the authorities concerned and this Court cannot interfere into the disputed question of facts as to the user of each and every article, thus, writ petition is not appropriate remedy for deciding the question raised in the instant writ petition. The question has to be decided on the basis of the evidence to be adduced before the assessing authority. When alternative remedy is available which is statutorily provided where the questions of facts can be raised including the invalidity of the notice for any reason an interference in the writ petition is not warranted and it is submitted by the respondents that this Court in para 8 of the decision (Annexure G) rendered in the previous writ petition No. 2685/83 decided on 31-8-1989 has left it open to the respondents to take the decision in respect of the classification. With respect to the question as to whether the goods in question could be subjected to any excise duty and that in any event,

the approval accorded by the excise officials to the classification lists, could be reviewed. It is submitted that this process has been undertaken within the period of limitation. Thus, no interference is required to be made in this writ petition particularly at this juncture as petition has not replied to the show cause notices before the assessing authority.

Shri V.K. Tankha, learned Sr. counsel appearing for the petitioner, has urged that particularly when period of classification list which was issued earlier was partially covered in the previous writ petition in which decision was rendered by the Division Bench of this Court. It was not open to the respondents to have issued the show cause notice covering some of the lists which were subject matter of the decision (Annexure G) rendered by this Court in M.P. No. 2685/83 decided on 31-8-1989. He has submitted that in any case para 8 does not empower the respondents to issue the notice beyond the period of 6 months to revise the classification if any. Learned counsel has further submitted that the articles are classifiable under items No. 67 not item No. 68 for subsequent period under chapter 3801.00 and not under 8545 and the articles cannot be treated as electrodes as proposed by the respondents and classification made earlier is binding on the respondents under rule 173B of the Rules.

Smt. Indira Nair, learned Sr. counsel submits that it is open to the authorities to revise the classification under rule 173B. It is also submitted that as this Court has allowed this exercise to be undertaken by respondent in para 8 of decision (Annexure G), it cannot be said to be violation of the direction issued by this Court. The question of limitation is depending upon the facts. No final classification was made earlier. As such question of limitation is not of any significance as final classification was to be made. The articles which are proposed to be classified under chapter 67 and for subsequent period under chapter heading 8545 main question for consideration is for which purpose the articles can be used which is question of fact in both cases, thus, the show cause notice is legal and valid. The question of fact with respect to the user cannot be decided in the writ petition, thus, writ petition is not appropriate remedy for raising the dispute.

True it is that show cause notice is not end of the matter but is beginning. The question of user of articles is one of the main question on which depends the question of classification to be made. Question of user can be decided on evidence to be adduced before authorities and cannot be decided outrightly by this Court in writ petition, particularly when this exercise has to be done by the statutory authorities under the Act and evidence has to be adduced before the assessing authority with respect to the user.

With respect to examining the other submission of limitation also this question has to be gone into; what was the nature of the declaration submitted earlier whether it was the case of provisional classification made or the final one, for that evidence has to be looked into and moreover no relief can be granted until and unless user can be ascertained on the basis of the evidence to be adduced

by the petitioners; as mentioned in the show cause notice user is the main basis which is the question of fact.

Scope of making interference into the show cause notices particularly in the matter of excise and other such claims is limited. The Apex Court in *Shri Vivekanand Mills Ltd. vs. Union of India*, 1999(109) E.L.T. 32 (SC) has held that ordinarily in a writ petition facts are not to be investigated, demand was time-barred under Rule 10. The Apex Court directed the question to be raised before the statutory authority as question of facts not to be adjudicated in a writ petition. In *Union of India (UOI) Vs. Bajaj Tempo Limited and Others*, the Apex Court has laid down that there should be no interference with the show cause notice in a writ petition under Article 226 of the Constitution, reply to such notice should be submitted by the assessee, question of fact cannot be determined by the High Court in writ petition. In *Union of India vs. Polar Marmo Agglomerates Ltd.* 1997(96) E.L.T. 21 (SC) the Apex Court has considered the jurisdiction of the High Court to interfere at the stage of show cause notice to take over the fact finding investigation. The decision of the High Court was set aside, it was held by the High Court that respondents' product was not taxable to excise duty, the jurisdiction of the High Court was questioned. Resolving this question, the Apex Court has held that fact finding authority under the relevant statute must be approached first, High Court should not have interfered in a writ petition at the stage of show cause notice to take over fact finding investigation. In *Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others*, , the Apex Court has laid down that Article 226 of the Constitution of India is not meant to short-circuit or circumvent statutory procedures. It is only where statutory remedies are entirely ill-suited to meet the demands of extraordinary situations, as for instance where the very "vires" of the statute is in question or where private or public wrongs are so inextricably mixed up and the prevention of public injury and the vindication of public justice require it that recourse may be had to Art. 226 of the Constitution. Same is the view taken in *Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others*, and *Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others*, , in which it has been laid down that if fundamental rights are involved or there is failure of principles of natural justice or proceedings are wholly without jurisdiction or vires of Act has been challenged. There can be an interference in the writ petition not otherwise. In various decisions of High Court in *Dewas Tools Pvt. Ltd. vs. Union of India* 1996(87) E.L.T. 25 (M.P.), *Union of India vs. Sigma Electronics* 1996 (87) E.L.T. 26 (Cal), *Shree Synthetics Ltd. vs. Union of India*, 1999 (114) E.L.T. 791 (M.P.), *Methodex Systems Pvt. Ltd. vs. Union of India* 1997(95) E.L.T. 23 (M.P.), *R.K.K.R. Steels Ltd. vs. Central Board of Excise and Customs* 1995 (76) E.L.T. 576 (Mad.), *Loharu Steel Industries Ltd. vs. Collector of Central Excise* 1993 (66) E.L.T. 179 (Kar.), *National Winder vs. Union of India* 1993 (64) E.L.T. 388 (All), the consensus of the judicial opinion is apparent that at the stage of issue of show cause notice until and unless there is patent violation of law, no interference should be made particularly in revenue matters

and proceedings cannot be forestalled by an interim order passed, such a recourse has been deprecated by the Apex Court in *Asstt. Collector of Central Excise, Chandan Nagar, West Bengal vs. Dunlop India Ltd. and others* (supra).

In view of the nature of dispute in the instant case, in my opinion, no interference is called for in the show cause notice. It is open to the petitioner to raise the question of limitation including the one on the basis of the decision of this Court and the question whether any notice issued covered the classification list which was subject matter of the decision of the previous writ petition and whether it is open to revise classification and such other issues have to be raised by the petitioners before the authority. This Court has allowed the respondents to consider question of classification in order (Annexure G). I do not find any sufficient ground to make an interference in writ petition in matter at stage of show cause notice only and remedy is available to petitioner before statutory authorities.

Resultantly, writ petitions are dismissed. No order as to costs.