

(1989) 08 MP CK 0079
In the Madhya Pradesh High Court
Case No : M.P. No. 2685/83

Hindustan Electro Graphites Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 31-08-1989

Acts Referred:

Central Excise Rules, 1944 — Rule 173B, 173B(2), 173B(2A), 173CC, 9B
Central Excises and Salt Act, 1944 — Section 11A
Constitution of India, 1950 — Article 226
Medicinal and Toilet Preparations (Excise Duties) Act, 1955 — Section 2

Citation : (1993) 44 ECC 14 : (1990) 50 ELT 15

Hon'ble Judges : G.G. Sohani, Acting C.J.; H.M. Agrawal, J

Bench : Division Bench

Advocate : L.M. Singhvi, Y.S. Dharmadhikari and S.N. Kohli, for the Appellant;

Judgement

G.G. Sohani, Acting C.J.

1. This is a petition under Article 226 of the Constitution of India.

2. The material facts giving rise to this petition, briefly, are as follows:

(i) Petitioner No. 1 is a Company registered under the Companies Act, 1956 and carries on the business of manufacturing graphite electrodes, nipples and anodes at its factory situated at Mandideep, District Raisen, in the State of Madhya Pradesh.

(ii) The excise duty payable in respect of manufacture of graphite electrodes is specified in Tariff Item No. 67 of the First Schedule to the Central Excises and Salt Act, 1944, (hereinafter referred to as the Act). The relevant entry reads as under:

"Graphite Electrodes and Anodes; all sorts.... Fifteen per cent ad valorem."

(iii) During the course of manufacture of graphite electrodes, a number of other products like graphite lumps, graphite flakes, graphite electrodes rejects,

graphite nipple rejects, graphite dust etc. are obtained by the petitioner Company and for the manufacture of these products, the petitioners obtained a licence Exhibit "B".

(iv) Under Rule 173-B of Central Excise Rules, 1944 (hereinafter referred to as the Rules), every assessee is required to file with the proper Officer for approval, a list in the prescribed form, showing the full description of excisable goods produced or manufactured by him and the Item No. of the First Schedule to the Act under which such goods fall and the rate of duty leviable on such goods. The list submitted by a manufacturer assessee under this Rule is known as "Classification List". The classification lists submitted by the petitioner from 4-8-1977 to 1-4-1983 are Annexure "C" and Annexures D-I to D-32. In Col. No. 2 of these lists, the assessee manufacturer is required to give full description of the goods produced or manufactured by him. In Col. Nos. 3 and 4, the assessee has to specify the Item No. and the rate of duty leviable, but the note in the prescribed form lays down that if the assessee has any difficulty in filling Columns 3 and 4, he may leave them blank and these would be filled up by the Central Excise Officers. According to the petitioner company, the goods in question were covered by Item No. 68 of the First Schedule to the Act which reads as under:

"68. All other goods, not elsewhere specified, but excluding:

- (a) alcohol, all sorts, including alcoholic liquors for human consumption;
- (b) opium, Indian hemp and other narcotic drugs and narcotics; and
- (c) dutiable goods as defined in section 2(c) of the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 (16 of 1955).

Explanation: For the purposes of this Item, goods which are referred to in any preceding Item, in this Schedule for the purpose of excluding such goods from the description of goods in that Item (whether such exclusion is by means of an Explanation to such Item or by words of exclusion in the description itself or in any other manner) shall be deemed to be goods not specified in that Item.... Ten per cent ad valorem,"

(v) Sub-rules (2) and (2A) of Rule 173B are as follows:

"(2). The proper officer shall, after such inquiry as he deems fit, approve the list with such modifications as are considered necessary and return one copy of the approved list to the assessee who shall, unless otherwise directed by the proper officer, determine the duty payable on the goods intended to be removed in accordance with such list.

(2A). All clearances shall, subject to the provisions of Rule 173CC, be made only after the approval of the list by the proper officer. If the proper officer is of the opinion that on account of any inquiry to be made in the matter or for any other reason to be recorded in writing there is likely to be delay in according the

approval, he shall, either on a written request made by the assessee or on his own accord, allow such assessee to avail himself of the procedure prescribed under Rule 9B for provisional assessment of the goods."

The relevant provisions of Rule 9B are as follows :

"RULE 9B. Provisional assessment to duty:

(1) Notwithstanding anything contained in these rules :

(a) Where the proper officer is satisfied that an assessee is unable to produce any document or furnish any information necessary for the assessment of duty on any excisable goods; or

(b) where the proper officer deems it necessary to subject the excisable goods to any chemical or any other test for the purpose of assessment of duty thereon; or

(c) where an assessee has produced all the necessary documents and furnished full information for the assessment of duty, but the proper officer deems it necessary to make further inquiry (including the inquiry to satisfy himself about the due observance of the conditions imposed in respect of the goods after their removal) for assessing the duty, the proper officer may, either on a written request made by the assessee or on his own accord, direct that the duty leviable on such goods shall, pending the production of such documents or furnishing of such information or completion of such test or enquiry, be assessed provisionally at such rate or such value (which may not necessarily be the rate or price declared by the assessee) as may be indicated by him, if such assessee executes a bond in the proper form with such surety or sufficient security in such amount, or under such conditions as the proper officer deems fit, binding himself for payment of the difference between the amount of duty as provisionally assessed and as finally assessed."

(vi) The classification lists submitted by the petitioner company were not modified by the excise officials while according the approval and the excise duty payable on the goods in question was accordingly paid by the petitioner company under Tariff Item No. 68.

(vii) On 3-9-1983, respondent No. 4 issued a show cause notice to the petitioner company u/s 11A of the Act calling upon the petitioner company to show cause why the short levy of excise duty recovered on the aforesaid goods from 1-9-1977 to 31-7-1983 amounting to Rs. 22,89,458.43 Paise be not recovered from the petitioner company as the said goods were wrongly classified under Item No. 68 when they were covered by Tariff Item No. 67. Aggrieved by this notice (Annexure A), the petitioners have filed this petition.

3. During the pendency of the petition, respondent No. 4 issued a corrigendum Exhibit A, to the show cause notice and called upon the petitioners to show cause why the amount of short levy for the period from 1-9-1977 to 31-7-1983 amounting to Rs. 38,79,523.19 Paise be not recovered from the petitioners. The

petitioners have, therefore, prayed that the notice Annexure A, read with Annexure A-I be quashed.

4. The petitioners contend that the goods in question are not excisable items, that in any event, they are not covered by Tariff Item No. 67, that the excise authorities having given their approval to the classification lists filed by the petitioner company, are not competent to review their approval and that the show cause notice "Annexure A" read with "Annexure A-I" issued by the respondents u/s 11-A, is without jurisdiction as it is barred by limitation and is founded on facts which do not empower respondent No. 4 to issue that notice.

5. On behalf of the respondents, a preliminary objection is raised that a petition under Article 226 of the Constitution of India, is not maintainable as the petitioners have an alternative remedy available under the Act. It is further contended that the goods in question are subject to excise duty and that as they are all products of graphite and used as conductors of electricity, they are properly covered by Item No. 67 dealing with all sorts of Graphite Electrodes. It is further contended that the classification lists submitted by the petitioners were only provisionally approved and the petitioners cannot make any grievance if the short levy is sought to be recovered from the petitioner company as a result of final assessment.

6. In view of the contention urged on behalf of the parties, the first question for consideration is whether the petitioners are entitled to any relief under Article 226 of the Constitution of India. In this connection, we may usefully refer to the following observations of a D.B. of this Court in 1978 (2) E.L.T. (J 632) (Universal Cables Ltd. v. Union of India and Others:

"Learned counsel for the respondents has further argued that as no final order has been passed in any of the cases and as the petitioner's contentions would be considered by the excise authorities while passing final orders in all these cases, no interference should be made under Article 226 at the stage of notice. It is now settled law that if a notice issued by a tribunal or authority threatening to initiate proceedings prejudicial to a person is on admitted facts in excess of jurisdiction, the tribunal or authority can be prohibited from further proceeding in the matter under Article 226 to save unnecessary harassment of the person concerned: [See Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another, ; East India Commercial Co. Ltd., Calcutta and Another Vs. The Collector of Customs, Calcutta, . In N.B. Sanjana, Assistant Collector of Central Excise, Bombay and Others Vs. The Elphinstone Spinning and Weaving Mills Company Ltd., which is a case under the Central Excises and Salt Act, interference made by the Bombay High Court at the notice stage under Article 226, was upheld by the Supreme Court. We, therefore, do not accept the submission that no interference should be made at this stage under Article 226 in these petitions.

We respectfully agree with the aforesaid observations. The real question for

consideration, therefore is whether the notice Annexure "A" issued by respondent No. 4, is in excess of jurisdiction conferred on the excise officials by Section 11-A of the Act.

7. The relevant provisions of Section 11A are as follows:

"Section 11A. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded.

(1) When any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, a Central Excise Officer may, within six months from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made requiring him to show cause why he should not pay the amount specified in the notice:

Provided that where 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, 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, the provisions of this sub-section shall have effect, as if for the words "six months", the words "five years" were substituted.

Now it is not disputed that the impugned notice is beyond the period of six months prescribed therefor. To make the demand for duty sustainable beyond a period of six months, the Supreme Court has observed in AIR 1989 S.C. 832 = 1989 (40) ELT 276 (SC) (Collector of C. Ex., Hyderabad v. M/s Chemphar Drugs and Liniments, Hyderabad):

"In order to make the demand for duty sustainable beyond a period of six months and upto a period of 5 years in view of the proviso to Sub-section 11A of the Act, it has to be established that the duty of excise has not been levied or paid or short-levied or short-paid, or erroneously refunded by reasons of either fraud or collusion or wilful misstatement or suppression of facts or contravention of any provision of the Act or Rules made thereunder, with intent to evade payment of duty. Something positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is required before it is saddled with any liability, before the period of six months. Whether in a particular set of facts and circumstances, there was any fraud or collusion or wilful misstatement or suppression or contravention of any provision of any Act, is a question of fact depending upon the facts and circumstances of a particular case. The Tribunal came to the conclusion that the facts referred to hereinbefore do not warrant any inference of fraud. The assessee declared the goods on the basis of their belief of the interpretation of the provisions of the law that the exempted goods were not required to be included and they did not include the value of the exempted goods which they manufactured at the relevant time. The Tribunal

found that the explanation was plausible and also noted that the Department had full knowledge of the facts about manufacture of all the goods manufactured by the respondent when the declaration was filed by the respondent."

In the light of the aforesaid decision of the Supreme Court, it has to be ascertained whether from the facts set out in the impugned notice, any inference of fraud, collusion, wilful misstatement or suppression of facts or contravention of the provisions of the Act or of the Rules with intent to evade payment of duty by the petitioner is made out. Now the only allegation in this behalf made by the respondents in the impugned notice Annexure "A" is that the assessee had "misclassified the graphite products under the Tariff Item 68 against their correct classification under Tariff Item 67 of the Central Excise Tariff". It is not the case of the respondents that full description of excisable goods produced or manufactured by the petitioner company, was not given in the classification lists or that the description given of these items in those lists was misleading. The duty of the assessee is to give full description of excisable goods so as to enable the excise authorities to determine the item number of the First Schedule to the Act under which such goods fall. If according to the petitioners, the goods in question were covered by Item No. 68, their interpretation of Item No. 67 or 68 of the First Schedule to the Act cannot be held to be so unjustified as to raise the inference of fraud or wilful misrepresentation. Item No. 67 refers only to graphite electrodes, all sorts, and it is not the case of the respondents that graphite dust, flakes, etc., the goods in question, were graphite electrodes. The case of the respondents is that Item No. 67 covers all graphite products which serve as conductors of electricity. Whether the interpretation of Item No. 67 by the petitioners or the interpretation of that item by the excise authorities is correct, is not decisive for raising an inference of fraud or wilful misrepresentation on the part of the petitioners. The interpretation of Item No. 67 by the petitioners is a plausible interpretation. Moreover, their interpretation was subject to scrutiny by the excise officials who accorded their approval to the classification. In the instant case, the excise officials approved the lists without any modification as contemplated by sub-rule 2 of Rule 173B. The provisions of sub-rule 2A of Rule 173B were not resorted to. There was no provisional assessment to duty as provided by Rule 9B. There is no material whatsoever on record to show the applicability of the provisions of clause (a) or clause (b) or clause (c) of sub-rule (1) of Rule 9B so as to empower the proper officer to proceed to make provisional assessment. The endorsements made by the excise officials on the classification lists "C" and "D-I" to "D-32" submitted by the petitioner company, disclose that these lists were "approved" or "approved until further orders" or "approved Subject to production of end use certificate". It is not disputed that the petitioner company did produce end use certificates. The respondents do not contend that as a result of production of these certificates, any modification of the approval accorded by them became necessary. Neither the procedure laid down in Rule 9B for making provisional assessment to duty was followed, nor is there anything on record to suggest that the assessment was provisional. The

respondents have not produced any order passed by any excise official holding that the goods in question are liable to be assessed under Tariff Item No. 67 and not under Item No. 68. Even in the notice (Annexure A), the petitioner company has been called upon to show cause why the classification of the goods in question should not be revised and the goods be classified under Item No. 67. It is thus clear that till that date, there is no order revising or modifying the approval accorded to the classification lists submitted by the petitioners. Unless the approval accorded by the excise authorities to the classification lists is modified or revised in accordance with law, it cannot be held that there was any short levy as alleged in the impugned notice. Under the circumstances, the proceedings initiated u/s 11A of the Act cannot be held to be justified.

8. It was urged on behalf of the petitioners that the goods in question could not be subjected to any excise duty and that in any event, the approval accorded by the excise officials to the classification lists, could not be reviewed. It is, however, not necessary to go into these questions in the instant case as the petitioners had themselves submitted the classification lists showing that the goods in question were excisable. There is also no material on record to show that the approval accorded by the excise officials to the classification lists was subsequently reviewed at any time according to law. Under the circumstances, we refrain from expressing any opinion on the question as to whether the goods in question are or are not subject to excise duty and whether the excise officials have power to review the approval accorded to the classification lists.

9. In the instant case, as already observed, there is absolutely no material on record to show that the petitioner company had committed any fraud or made any misrepresentation with regard to the particulars of the goods which would have misled the excise officials in deciding the relevant item of the First Schedule under which the excise duty could be levied on the goods in question. Even assuming that the item number of the First Schedule to the Act under which the excisable goods fall, has not been correctly shown by the petitioners, this fact, by itself, cannot lead to the inference that the assessee is guilty of fraud, suppression of facts or of wilful misrepresentation. Moreover, until the approval accorded by the excise officials to the classification list is reviewed in accordance with law, the question of any short levy, as alleged in the notice, does not arise. Under the circumstances, it cannot be held that the notice Annexure "A", read with its corrigendum "A-I", is without jurisdiction and deserves to be quashed.

10. The petitioners have also prayed that it be declared that graphite fines obtained by the petitioner company, are not subject to any excise duty. The petitioners, however, have themselves classified graphite fines vide Annexure "C" as falling under Item No. 68 of the First Schedule to the Act and if according to them it was under some mistake, the petitioners are at liberty to take appropriate proceedings in that behalf where facts could be investigated. The petitioners are not entitled to any relief in that behalf under Article 226 of the

Constitution.

11. For all these reasons, the petition is partly allowed. The notice Annexure "A" and corrigendum "A-I" are quashed and the respondents are restrained from enforcing the demand made by the notices. In the circumstances, parties shall bear their own costs. Security amount, if any, be refunded to the petitioners.