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(1993) 03 AHC CK 0015

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 41 of 1993

Hindustan Safety Glass Works Ltd. — APPELLANT

Vs

Collector of Central Excise — RESPONDENT

Date of Decision : 17-03-1993

Acts Referred:
Central Excises and Salt Act, 1944 — Section 11A, 11A(1)
Constitution of India, 1950 — Article 226

Citation : (1993) ECR 191 : (1993) 65 ELT 166

Hon'ble Judges : M.C. Agarwal, J;A.P. Misra, J

Bench : Division Bench

Advocate : Rajesh Kumar and S.P. Gupta, for the Appellant; H.S. Nigam, S.S.C., for the Respondent

Final Decision : Allowed

Judgement

A.P. Misra, J.—In view of the exchange of affidavits between the parties and as agreed to the present writ petition is being disposed of finally at the stage of admission.

2. The petitioner seeks quashing of show cause notice dated 4th January, 1993 (Annexure 2 to the writ petition), issued by the Collector, Central Excise, Allahabad whereby an additional excise duty amounting to Rs. 40,04,757.63R has been demanded from the petitioner for the period December 1987 to November 1992. The challenge is that proviso to Section 11A of the Central Excises and Salt Act, 1944 (hereinafter referred to as the Act) is not applicable on the facts and circumstances of this case. Therefore, the demand for a period of five years is unsustainable.

3. The only question raised before us to which we are adverting in this petition is whether proviso to Section 11A is applicable or not. The relevant portion of Section 11A is quoted hereunder :-

"Recovery of duties not levied or not paid or short-levied or short-paid or

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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 willful 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, the provisions of this sub-section shall have effect, as if for the words ''Central Excise Officer'', the words ''Collector of Central Excise'', and for the words ''six months'', the words ''five years'' were substituted."

Before proviso is made applicable it has to be seen whether there was any fraud, collusion, willful mis-statement or suppression of fact by the petitioner for the department to issue the impugned notice claiming duty for a period beyond period of six months. Under sub-section (1) of Section 11A there is no such requirement, but the show cause notice for the recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded has to confine for a period of six months from the relevant date. However, if a case is covered under the proviso the period for which show cause notice is valid is five years from the relevant date instead of six months. Normally, the question whether there is any fraud, collusion, willful mis-statement or suppression of facts are all in the realm of question of fact and it is not proper in a proceeding under Article 226 of the Constitution to go into them and to record findings for the purpose of testing the validity of the notice under it. It is only when on admitted facts and on the facts stated in the show cause notice even if accepted if it is not possible to draw any conclusion of fraud, collusion, willful mis-statement or suppression of facts only then this Court would interfere with further proceedings in pursuance to the said notice. It is necessary to state certain facts for the disposal of issue involved in this case.

4. The petitioner manufactures and sells windscreens of laminated sheet glass, which is excisable under the aforesaid Act. They are classified under sub-heading No. 7004.20 of Chapter 70 Section XIII of Central Excise Tariff Act, 1985 (hereinafter referred to as 1985 Act) and chargeable to central excise duty under Notification No. 68/87 dated 1st March, 1987 as amended from time to time (Annexure 1 to the petition). The impugned notice pertains to item laminated safety glass of the thickness of 6 mm and 8 mm. The notice relates to the period December 1987 to November 1992. The case of the respondents in the notice is that the description of 6 mm and 8 mm by the petitioner was a mis-statement as the thickness described by the petitioner 6 mm and 8 mm would be treated to be

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6.38 mm and 8.38 mm respectively. The petitioner purchases sheet glass from its manufacturer M/s. Triveni Sheet Glass Ltd. and in the process of manufacture of sheet glass it is not possible to manufacture it with precise scientifically accurate uniform thickness. Thus, there is always little plus and minus size of thickness. That is why, according to the petitioner, the thickness of sheet glass is known and understood and described by a nominal thickness. Keeping this in view of the Bureau of Indian Standard has laid down Indian Standard Specifications for flat transparent sheet glass by I.S. 2835-1987 (which has been referred in the impugned notice). According to it in the nominal thickness of 3 mm or 4 mm of such glass-sheet the range of thickness is between 2.80 mm to 3.20 mm and 3.80 mm to 4.20 mm for 4 mm thickness. Similarly, Indian Standard Specification for safety glass by I.S. 2553-1971 specified the requirement specified for laminated safety glass under Paragraph 4.3 for laminated safety glass between 4.0 to below 7.0 range and tolerance permissible + is 0.40. The petitioner''s case falls under this category. Thus, for 6 mm laminated safety glass it could be between 5.60 mm to 6.40 mm. The sheet glass purchased by the petitioner is marked by the seller and also by the producer, viz. The petitioner has nominal thickness of 3 mm and 4 mm sheet glass respectively. For manufacturing laminated safety glass of the nominal thickness of 6 mm the petitioner uses two layers of sheet glass of 3 mm thickness and between the two sheets an inter layer of adhesive of polyvinyl butryl of .38 mm thickness is placed and by applying heat and pressure to the sandwich, so that plastic interlayer firmly sticks to the inner surface of the two glass sheets. According to the case of the petitioner, the sheet glass supplied by the manufacturer with the nominal thickness of 3 mm as well as 4 mm are sorted out. It seems on account of a contract with the railways requiring 6.3 mm laminated glass the petitioner sorted out after supply by the manufacturer of the glass-sheets. This is to facilitate that those sheet-glasses within the said range having a thickness to qualify to come under 6.3 mm after laminated glass is manufactured in order to make the supply of the same to the Railways. The case further is even though within the permissible range of limit of 6.40 mm the chargeable duty would be that of 6 mm, but in order to eliminate any possible doubt arising in the minds of respondents, the petitioner has been paying duty on laminated glass of thickness of 6.3 mm, the duty was paid for 7 mm thickness. The petitioners states that this categorisation of 6.3 mm in R.G. 1 register is mainly done to cater the needs of Railways and Defence which give specification of thickness of 6.3 mm in their order. In the petitioner''s R.G. 1 register maintained, this laminated safety glass is shown...of two categories, one 6 mm and the other 6.3 mm. All these entries are checked and signed on the date of checking and for the period for which the impugned notice has been given there was a regular checking of the said register done by the officers of the respondents. The petitioner has been making clearances of this from the factory under the self removal system and has been paying excise duty (after availing the benefit of Modvat scheme) on the basis of the aforesaid categorisation founded on the nominal thickness of the laminated safety glass, even at the time of assessment it was known to the officials of the

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Excise department regarding categorisation and it was known to the department and they understood that the nominal thickness of 6 mm covered the actual thickness upto 6.4 mm. In fact, in the case of nominal thickness of 6.3 mm the actual thickness could be more than 6.4 mm and upto 6.78 mm. It is these facts on the basis of which the petitioner states that at no stage there was any kind of mis-statement muchless willful mis-statement or suppression of any fact by the petitioner in the payment of excise duty.

5. The case of the respondents, on the other hand, is that for attracting duty of central excise under Notification No. 68/87 dated 1st March, 1987, the duty of laminated glass is dependant upon thickness in millimeter per square metre and the present rate of duty is Rs. 31.50 P. per millimeter or part thereof per square metre. When the Officers of the Preventive Branch visited the petitioner''s unit on 17th July, 1992, on close scrutiny, found the thickness of laminated safety glass sheets were more than 6 mm. However, on investigation by going through the technical of the manufacturing process including "Encyclopedia of Glass ceramic and cement" edited by Martin Grayson and published by John Wile and Sons and "Glass Engineering Handbook" (third edition) written by George W. Mc Idlan and Errol B. Shand and published by Mc Graw Hill Book Co., the relevant pages of which are relied upon in the show cause notice, it became evident that in the process of manufacturing laminated sheet glass the thickness of either the sheet-glass or plastic interlayer does not reduce and the thickness plastic interlayer forms part of total thickness of the laminated safety glass, and this fact further became clear to the respondents beyond doubt in the Indian Standard No. IS 2553 (Part 2) 1992, under Paragraph 5.2,1 of which it is stated :

"that the nominal thickness of laminated safety glass shall be the combined thickness of sheet glass and interlayer and the thickness range shall be the nominal thickness ? 2n where n is the number of glass sheet."

It is on account of the aforesaid literature, which further was clear beyond doubt by IS Part II issued in 1992 that when the petitioner was using two glass sheets of 3 mm each and interlayer of .38 mm then the thickness of laminated safety glass manufactured by the petitioner would be 3 mm + 3 mm + .038 mm = 6.38 mm. It is this technical know-how when come to the knowledge of the respondents they saw that though the thickness manufactured by the petitioner is 6.38 mm, but has been misdescribed as 6 mm in RG-1 register. Further, the respondents became suspicious that whenever purchase order was of 6.3 mm where purchases were made by Railways and Defence Department, the petitioner paid higher duty of 7 mm. thickness. In other words, the foundation of the impugned notice is knowledge of technical manufacturing process having been understood by the Department through various literature referred in the show cause notice and further IS 2553 (Part 2) 1992 also reiterating the same, viz. when two sheet glasses are fixed by interlayer adhesive the thickness is not reduced but would be the same as the total thickness of the sheet glass and the thickness of the interlayer and further doubt having arisen as to why the

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petitioner was paying higher duty on thickness of laminated glass manufactured by the petitioner of 6.3 mm while making supplies to the Railways and Defence Department. The question is whether the petitioner while intending and making declaration for the payment of duty has made any mis-statement, committed any fraud or collusion or suppressed any fact while describing the thickness of the laminated glass sheets while placing it before the concerned respondent-authorities.

6. One of the point strongly contended in the present case is whether describing the thickness it was the actual thickness or the nominal thickness. If actual thickness was to be measured for each laminated glass-sheet, if not done and made the department to believe the thickness mentioned in RG-1 register that they are actual thickness and the respondents having believed the same it could be said that it could be a case of mis-statement making belief to the respondents what it is not, though further question would be whether such mis-statement is willful or not. We find in this case even the respondent does not dispute this. In the counter affidavit it is admitted that the thickness of the sheet is described by nominal thickness in millimeter and this is a nominal thickness which represents the thickness of a glass-sheet. It is further admitted that it is not possible to manufacture sheet glass with a precise scientifically accurate thickness and there is bound to be some variation on the plus and minus (+-) sides. This is precisely why wherever any tolerance limit is prescribed any authority they are +- (plus and minus) to cover both the higher and lower sides. The factor is said to be inherent in the process which is taken care by tolerance limit. From the perusal of the counter affidavit and the stand on behalf of the respondents it is clear that it was a nominal thickness which was understood between the petitioner and the respondent-department. The respondents knew both for sheet-glass and laminated safety glass there is tolerance limit within which there would be variation of thickness and if it was incumbent on the petitioner to pay duty by actual measurement of the thickness of sheet-glass then the petitioner could have done while describing in RG-1 register. Admittedly the petitioner went on describing year after year only fixed measurement of 6 mm and 6.3 mm and the respondent authority went on signing the register regularly at regular intervals. Apart from the technical know-how which came to be known to the department later, to which we would be referring later, one thing was well known to the department and not disputed before us that there is variance of thickness of sheet-glass and laminated safety glass and the petitioner was describing not the actual thickness but the nominal thickness. It is true that the duty payable by the petitioner under the aforesaid notification dated 1st March, 1987, requires laminated glass and duty payable was at the rate of Rs. 31.50 p. per millimeter or part thereof. By describing two thickness 6 mm and 6.3 mm to the department also the petitioner is only describing the nominal thickness and not actual thickness. The petitioner has described having purchased sheet glass from another manufacturer of thickness 3 mm and 4 mm (nominal). That, two sheet glass of 3 mm were used with interlayer of .38 mm was also disclosed to the

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department. The description of 6 mm and 6.3 mm was also disclosed to the department. There was nothing which the petitioner ought to have disclosed and has not disclosed to the department except the technical know-how of the manufacturing process. Further, we find, nothing has been shown by the respondent regarding the actual measurement being made of thickness of glass, nor any precedence in the past pertaining to several years in the case of petitioner that the respondents objected to not describing the actual thickness. Admittedly, we have observed repeatedly the petitioner was describing the nominal thickness of the two categories and the respondents were accepting until they became aware, according to the respondents, firstly by the literature, as aforesaid, and as laid down in IS : 2553 (Part II) 1992. By the method laid down in 1992 as aforesaid they have directed to make measurement in the case of laminated glass of the total thickness of the sheet glass and the thickness of the interlayer and the total thickness of the laminated safety glass manufactured. Till this direction to the department for measuring laminated glass, as aforesaid for the earlier period there was neither any direction, nor anything existed on the record that what was required under the rules was not done by the petitioner. The only argument by the respondent is that it was the duty of the petitioner to have correctly described for the payment of duty and if he has not correctly described, he is liable to pay tax and that would also amount to willful mis-statement and thus covered by the proviso. We find since year after year declaration have been made by the petitioner...was not making any suppression of any fact or by committing fraud or collusion the statement even given before the authorities were all which were within the knowledge of the respondent nothing was concealed except what was argued that technical know-how of the manufacturing process was not revealed to the respondent would amount to mis-statement and respondent having come to know has issued the impugned Notice. In our considered opinion, even if it could be said that the petitioner did not disclose the manufacturing process or the technical know-how that by itself would not constitute a willful mis-statement. Lack of knowledge or lack of technical know-how of the respondents could be a case of escaping duty not levied or not paid or short levied, but would not constitute a willful mis-statement. willful mis-statement must constitute something willfully. willful statement is not merely a mis-declaration or mis-statement. Even mis-statement has to be such to have led the respondent authority to believe what is stated to be correct though it is not correct. In the present case, the respondents know that the petitioner is describing the thickness of nominal basis and not on actual basis and there is nothing to show that the petitioner made something to believe the respondent authority that measurement is actual and described as such when the respondents were also treating the measurement to be nominal and the petitioner was describing as such, then if the respondents desired they would have treated some of the material of the petitioner whether they actually crossed the tolerance limit or not, but while describing the thickness which is nominal on the facts of this case, would not constitute a case of willful mis-statement.

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7. Coming to the case of the respondents that the petitioner concealed the technical know-how is also not sustainable. Technical know-how is not what is with the petitioner exclusively domain which has to be disclosed. The duty cast on the petitioner would only extend to such material which is exclusively in his possession and he deliberately did not disclose which may lead to a case of willful mis-statement, but no disclosure of technical know-how of a manufacturing process is a matter which is exclusively in possession of the petitioner it is in the knowledge of the world at large, whatsoever desires to know it. If the department would have desired to know the same then it would have known earlier as they have come to know now, but merely non-disclosure by the petitioner of the technical know-how of the manufacture would not constitute an act of the petitioner, as willful act constituting the statement to be mis-statement and further qualify to be a willful mis-statement. Further even this would not lead to an inference of suppression of fact. Again, as we have said above, suppression of fact would only be those facts which are exclusively in the knowledge of the petitioner and in that regard the technical know-how would not fall.

8. Lastly, the argument is that since the petitioner was selling to Railways and Defence Department, laminated safety glass of 6.3 mm doubt arose as to why out of the same material which the petitioner was receiving from the manufacturer of sheet glass two categorisation was made, one of 6 mm and the other of 6.3 mm. If the order placed by the Railway and the Defence Department was of 6.3 mm, which admittedly come within the tolerance limit of 6 mm. The question is if laminated safety glass, the supply of which is made to the Railways, which if it falls within the same range, how range of laminated safety glass was manufactured. The question may be if the supply made to the Railways was true or not, i.e. whether such description was correct or not, to which it is not necessary for us to go into. However, this may only create doubt and merely a doubt being created on account of the said transaction of categorisation would not be a case qualifying under the said proviso. It must be based on the intrinsic evidence on the record of fraud, collusion, willful mis-statement or suppression of fact and not merely a doubt.

9. On behalf of the respondents reliance is placed in Jaishri Engineering Co. (P) Ltd., Vs. Collector Of Central Excise, Bombay, . In this case the Court found that there was deliberate suppression and penalty was imposed. It is further held, to which reliance has been placed that where there was fraud, collusion, willful mis-statement or suppression of fact is a question of fact. It is true we have observed above that normally for recording this finding evidence has to be examined for recording this fact which is a question of fact and this Court normally does not interfere in proceedings in pursuance to such show cause notice. However, in a case where all the facts are accepted as slept in the show cause notice and if there is no evidence on the record to lead to the conclusion of any fraud, collusion, willful misconduct or suppression of fact than this Court would pass appropriate orders on the facts and circumstances of such case in its

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extraordinary powers under Article 226 of the Constitution of India. In this case, no reliance can be placed by the respondent in view of the finding :-

"...The Tribunal noted that the appellant could hardly contend that it discharged the onus of making correct declaration if it had withheld the description which was commonly used in respect of the goods not only by itself, but also by those from whom it brought or to whom it sold the products. The appellant itself was buying and selling these nuts and as such there was no conceivable reason why these nuts were described as end-fittings in the declaration to the Department...it cannot be said not without justification that these goods should have been described as nuts because the appellant itself had treated these as nuts."

This case was a clear case of willful mis-statement and suppression of fact.

10. In the case of Padmini Products Vs. Collector of Central Excise, Bangalore, the Court relying on its earlier decision held :-

"It was observed by this Court that something positive other than more inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer know otherwise is required before it is saddled with any liability beyond the period of six months had to be established ....As mentioned hereinbefore, mere failure or negligence on the part of the producer or manufacturer either for doubt as to whether licence was required to be taken out or where there was scope for doubt whether goods were dutiable or not would not attract Section 11A of the Act."

11. In Oudh Sugar Mills Ltd v. Union of India 1978 (2) E.L.T. 172 it was held :-

"Show cause notice issued on the basis of average production, no evidence for removal of goods without payment of duty - Human element plays a significant part in the process of manufacture - Average production cannot be made basis for issue of show cause notice - The findings based on such show cause notice are without any tangible evidence and are based only on inferences involving unwarranted assumptions and are vitiated by an error of law."

12. In view of the findings recorded by us above, and keeping in view the aforesaid decision we find the impugned show cause notice dated 4th January, 1993 (Annexure-2 to the petition) is unsustainable and is hereby quashed.

13. The writ petition is accordingly allowed. Costs on parties.

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