

(1988) 05 CAL CK 0011
In the Calcutta High Court
Case No : C.R. 9877 (W) of 1979

Indian Aluminium Co. Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 20-05-1988

Acts Referred:

Central Excise Rules, 1944 — Rule 12, 12(1), 12A, 13, 14
Central Excises and Salt Act, 1944 — Section 37

Citation : (1988) 17 ECC 375 : (1988) 36 ELT 435

Hon'ble Judges : Sudhir Ranjan Roy, J

Bench : Single Bench

Advocate : D.P. Gupta and S. Pal, for the Appellant; S. Bhattacharyya and Uma Sanyal, for the Respondent

Final Decision : Allowed

Judgement

This Judgment has been overruled by : Hindustan Petroleum Corporation Ltd. Vs. Collector of Central Excise, (1995) 77 ELT 256 : (1995) 4 JT 88 : (1995) 3 SCALE 1 : (1995) 3 SCC 45 Supp : (1995) 3 SCR 839

Sudhir Ranjan Roy, J.—The petitioner No. 1, the Indian Aluminium Company Ltd. is a Company within the meaning of the Companies Act, 1956 and the petitioner No. 2 is a shareholder of the petitioner No. 1 Company.

2. At all material times the petitioner No. 1 carried on and still carries on business of manufacturing and selling Aluminium and its allied products including Aluminium Sheets and Aluminium Container Sheets.

3. For the purpose of carrying on the said business the petitioner No. 1 owns and runs factories and/or plants at Belur (West Bengal), Hirakud (Orissa), Alupuram (Kerala), Belgaum (Karnataka), Kalwa (Maharashtra) and Taloja (Maharashtra).

4. At all material times Aluminium and its allied products including Aluminium Sheets and Aluminium Container Sheets as specified in Tariff Item 27 of the First Schedule to the Central Excises and Salt Act, 1944 were and still are excisable

commodities.

5. For the purpose of obtaining benefit of Rules 13 and 14 of the Central Excise Rules, the petitioner No. 1 at all material times has been exporting Aluminium products manufactured by it under Bond without payment of Excise Duty.

6. On or about 3rd August, 1979 the petitioner No. 1 received a show cause-cum-demand notice dated 2nd August, 1979, whereby the petitioner No. 1 was required to show-cause to the respondent Assistant Collector, as to why the petitioner should not be required to pay a sum of Rs. 25,316.06 paise as differential amount of Excise Duty as between the duty leviable and rebatable in terms of Notification No. 148-69-C.E", dated 17.5.1969 (An-nexure"A").

7. According to the petitioners, the impugned show cause-cum-demand notice is bad and/or illegal and/or has been issued without authority of law and jurisdiction.

8. It is clear from the said show cause notice that it has been issued as a consequence of an alleged order passed by the Government of India to the effect that the exporters are required to pay the unrebatable quantum of duty under Rule 12 of the Central Excise Rules even in respect of the goods cleared for export under bond without payment of duty under Rule 13 of the said Rules.

9. Similar show cause notices were also issued upon the petitioner No. 1 in respect of other consignments of Aluminium products exported by the petitioner No. 1 under bond in terms of Rule 13 of the Central Excise Rules.

10. According to the petitioner, no duty is leviable on goods exported in terms of Rule 13 of the Central Excise Rules and that being so, the show cause notices issued upon the petitioner No. 1 for payment of differential duties, are absolutely without jurisdiction. But since the respondent No. 6, the Assistant Collector of Central Excise will unnecessarily feel himself bound to follow the alleged order of the Government of India referred to in the show cause-cum-demand notices, the petitioners have come up before this Court directly for redress without showing any cause to the said Assistant Collector on the ground that it would be totally futile.

11. In the instant Writ petition the petitioners have asked for the issuance of a writ in the nature of Mandamus declaring that the Aluminium products under Item No. 27 of the First Schedule to the Central Excises and Salt Act, 1944 and exported under the provisions of Rules 13 and 14 of the Central Excise Rules, 1944 are not liable to and/or chargeable with any duty for excise whatsoever and also for a direction upon the respondents to forthwith withdraw, recall, cancel and/or rescind the impugned show cause-cum-demand notices and certain other connected orders and also for consequential reliefs.

12. The respondents having entered appearance through Mr. Sanjoy Bhattacharyya, the learned Counsel, seriously controverted the material averments as made in the writ petition, but did not file any affidavit-in-opposition.

13. Now, the petitioner No. 1, the Indian Aluminium Co. Ltd., as already seen, carries on business, inter-alia of manufacturing and selling Aluminium and its allied products and it has been exporting Aluminium products at all material times under bond without payment of any excise duty, taking advantage of Rule 13 of the Central Excise Rules (hereinafter referred to as the Rules).

14. However, on or about 3rd August, 1979 the petitioner No. 1 received a show cause-cum-demand notice (Annexure "A") issued by the Superintendent, Central Excise, for having exported excisable Aluminium goods as detailed in the annexure thereto, without payment of Central Excise duty in terms of Rule 13 of the Rules in spite of an order issued by the Central Government to the effect that the exporters should pay the unrebatable quantum of duty under Rule 12 in respect of goods cleared for export under bond without payment of duty for the sake of parity. Regarding the quantum of the rebatable amount reference was made to the Notification No. 148/69-C. E., dated 17.5.1969 issued by the Government of India.

15. The petitioner No. 1 was accordingly directed to pay the differential amount of Central Excise duty in terms of the said Notification in respect of the goods exported and the amount so payable was calculated at Rs. 25,316.06 paise.

16. It is this show cause notice, other similar notices, and the consequential orders which the petitioners have challenged in the instant writ petition.

17. In this connection the preliminary objection raised by Mr. Bhattacharjee, the learned Counsel for the respondents, was as regards to the maintainability of the writ petition on the ground that before invoking the writ jurisdiction of this Court, the petitioners should have exhausted the other statutory remedies as provided by the Central Excises and Salt Act.

18. Now, so far as to the right of a person to challenge a show cause notice, without resorting to the alternative remedies, it now seems to be well-settled that though ordinarily the person concerned should respond to such notice before the concerned authority, Courts have jurisdiction to interfere with such notice at the stage of its issuance, if the notice is shown to have been issued palpably without any authority of law State of Uttar Pradesh Vs. Brahm Datt Sharma and Another, .

19. According to the petitioners the show cause notice (Annexure "A") is, absolutely without any authority of law and in support thereof several contentions were raised by Mr. Dipankar Gupta, the learned Counsel for the petitioners, which will be considered in due course.

20. The main controversy, however, rests on the proper interpretation of Rule 13 vis a vis Rule 12 of the Central Excise Rules, since according to Mr. Gupta, the learned counsel, no excise duty was leviable, the goods having been exported under Bond in terms of Rule 13 as aforesaid and as a matter of fact no excise duty was levied in the past on similar goods exported under similar

circumstances.

21. Now, in order to appreciate the contention so raised by Mr. Gupta, Rule 12 and Rule 13 (as it was at the material time) are set down hereunder:

"RULE 12. Rebate of duty on goods exported.-(1) The Central Government may, from time to time, by notification in the Official Gazette, grant rebate of duty paid on excisable goods, if exported outside India, to such extent, and subject to such safeguards, conditions and limitations as regards the class of goods, destination, mode of transport, and other allied matters as may be specified therein.

Provided that if the Collector is satisfied that the goods have in fact been exported, he may, for reasons to be recorded in writing, allow the whole or any part of the claim for such rebate even if all or any of the conditions laid down in any notification issued under this rule have not been complied with.

Explanation. - For the purposes of this rule the term "Collector" includes the Collector of Central Excise at Madras, Bombay, Calcutta and Cochin and the Collector of Central Excise in whose territorial jurisdiction the airport or port of Visakhapatnam, Kakinada, Jamnagar, Mangalore, Bhavnagar, Veraval, Porbandar, Rameswaram, Tuticorin, Kandla, Cuddalore, Okha, Nagapatinam, Pondicherry and Paradip is located.

(2) Where the Central Government does not grant under Sub-rule (1) either wholly or partially and rebate of duty paid on excisable goods exported to a country outside India, it may, in order to promote exports or fulfil obligations arising out of any treaty entered into between India and the Government of that country provide for payment to the Government of that country an amount not exceeding the duty of excise paid on such goods which are exported out of India to that country."

" 13. Export under bond of goods on which duty has not been paid. - Goods other than salt, vegetable non-essential oils, and tea all varieties except package tea under T.C.(2) made from duty paid loose tea, may in like manner be exported without payment of duty, from a warehouse or a licenced factory, provided that export is made in accordance with the procedure set out in the relevant provisions of Chapter IX of these Rules and the owner enters into a bond in the proper Form, with such surety or sufficient security, and under such conditions as the Collector approves, in a sum equal at least to the duty chargeable on the goods, for the due arrival thereof at the place of export and their export therefrom under Customs or Postal supervision as the case may be, within the period prescribed for goods exported under Rule 12; and such bond shall not be discharged unless the goods are duly exported, to satisfaction of the Collector, within the time allowed for such export, or are otherwise accounted for to the satisfaction of such officer; nor until the full duty due upon any deficiency of goods, not so accounted for, has been paid.

Explanation. - For the purpose of this rule as well as Rule 14, 14A and 14B, (I) - the term "Collector" includes the Collectors of Central Excise at Bombay, Madras and Calcutta and (ii) the term "goods" includes excisable goods used in the manufacture of the goods which are exported."

22. Thus, Rule 12, as quoted above, relates to rebate of duty on goods exported and Rule 13 relates to export under bond of goods on which duty has not been paid

(emphasis supplied).

23. Under Rule 12 the Central Government may by notification in the official Gazette, grant rebate of duty on excisable goods, if exported outside India, Under this Rule the notified goods are cleared first on payment of duty and thereafter rebate in terms of the notification is claimed and the Collector on being satisfied that the goods in fact have been exported may allow the whole or any part of the claim for such rebate.

24. The Rule, significantly, does not provide wherefrom the goods are to be taken out for export and so also the relevant notification here is silent on that point.

25. It was, therefore, not without reason that it was contended by Mr. Gupta that such notified goods under Rule 12 may very well change hands, affording thereby opportunity to the successive owners to earn substantial profits thereon in the legal market, before the goods are actually exported.

26. Whereas, under Rule 13, the goods, as referred to therein, may be exported only "from a warehouse or a licensed factory". This means that whenever such goods are exported, the exportable shall be made from a warehouse or a licensed factory, that is, before such goods change hands in the local market. It need not be emphasized that under normal circumstances goods manufactured cannot be taken out for home consumption without payment of excise duty. Thus, goods exported under Rule 13 normally do not allow any profits to be made locally before the exportation takes place.

27. Regarding other broad differences, Rule 13, as it is, has not been made dependent on Rule 12 since it is self-contained and does not require any notification to be issued as in Rule 12 and there is even no reference therein as to the grant of rebate. Incidentally, the bond that is required to be executed under Rule 13 is not by way of security for payment of the unpaid duty on the exportation being completed. It stands as security only for proper exportation of the goods, which is apparent from the provision that the "bond shall not be discharged unless the goods are duly exported, to the satisfaction of the Collector, within the time allowed for such export, or are otherwise accounted for to the satisfaction of such officer; nor until the full duty due upon any deficiency of goods, not so accounted for, has been paid".

28. Had Rule 13 been supplementary to Rule 12 and exportation under Rule 13

also required payment of rebated duty as per notification issued under Rule 12 even in the absence of any specific mention about any post-exportation payment of duty, specific provisions would have been made in the Rule itself to secure payment of the unpaid duty after exportation. Instead of this what has been sought to be secured, is only proper exportation of the goods.

29. Coupled with the facts that Rule 13 is totally silent about any notification issued under Rule 12, or any consequent granting of rebate of excise duty following exportation of the goods, or as a matter of fact, regarding payment of any excise duty; the fact that no provision has been made in the Rule to secure payment of the rebated duty goes a long way to indicate that Rule 13 is totally independent of Rule 12 at least as regards to its vital provisions and goods exported under the said Rule are not leviable to any excise duty.

30. Reference in this connection may be made to Rule 47 of the Rules which provides that after manufacture and before removal, the goods may be stored in a Store room or warehouse without payment of duty. And under Rule 48, as it stood, the manufacturer was required to execute a bond undertaking inter alia not to remove the goods before payment of proper duty.

31. This indicated the cautious approach of the subordinate legislative authority in the matter of securing payment of duty in respect of goods leviable to duty but where such duty had not been paid. But very significantly Rule 13 which allows exportation of the goods without payment of duty under bond, does not provide for any safeguard to secure payment of duty after exportation. Such would not have been the position had Rule 13 been supplementary to Rule 12.

32. In this connection it may be mentioned here, that the identical question came up for consideration before a Division Bench of the Delhi High Court in *Hindustan Aluminium Corporation Ltd. Vs. Superintendent, Central Excise, Mirzapur and others*, and upon consideration of Rules 47, 48 and 49 of the Rules the Court observed that "removal of goods without payment of duty under the Rule does not by itself mean that no excise duty is payable. Rather every rule makes certain that removal or storage of goods without payment of duty is only permitted because a bond has been entered into for payment of duty (emphasis supplied); it does not exempt it. On the same analogy, export under a bond under Rule 13 only means that goods may be exported without payment of duty. It cannot mean total immunity from payment of excise duty...the only exemption it can claim is by virtue of notification issued under Rule 12...".

It must possibly be due to inadvertence that the Court overlooked the fact that the bond required to be executed under Rule 13 is not for payment of duty but only to secure proper exportation of the goods. And this appears to have resulted in the aforesaid interpretation of the rule, which for obvious reasons is not acceptable.

33. In my judgment, the contention of Mr. Bhattacharjee, the learned Counsel for the respondents, on the basis of the Bench decision of the Delhi High Court in

Hindustan Aluminium Corporation's case (supra) that the two Rules are supplementary with the only difference that under Rule 12 duty is paid at the outset and rebate is claimed after exportation and under Rule 13 no duty need be paid prior to exportation but is realisable afterwards in terms of the notification issued under Rule 12 does not, therefore, seem to me to be acceptable. The two Rules are basically different and independent of each other.

34. In* this connection, reference may be made to the following observation of the Delhi High Court in Hindustan Aluminium Corporation's case (supra) on which reliance was placed by Mr. Bhattacharjee : "We do not read Rule 13 as conferring any substantive right. This argument of Mr. Sorabjee suffers from infirmity inasmuch as it assumes as if goods which are exported under a bond have been exempted in whole from payment of any duty. But to give such exemption a notification under Rule 8 would have to be published in the Official Gazette."

35. But while making the aforesaid observation the provision of Section 37(xvii) of the Central Excises and Salt Act was completely overlooked under which the Central Government is authorised to make rules exempting any goods from the whole or any part of the duty imposed by the Act and Rule 13 ex-facie appears to be one of such rules under which payment of the whole of the excise duty has been exempted to the specified goods exported under bond.

36. It is true that Rule 13 speaks about exportation of the goods "in like manner," but the expression "in like manner" in my view, relates only to the procedure for exportation as specified in Chapter IX of the Rules which is equally applicable to export under Rule 12 as well as under Rule 13 and nothing beyond that. The substantive provisions of the two rules are entirely different and independent of each other and the reasons therefore have already been explained.

37. Referring to the decision of the Delhi H.C. (supra) it was next contended by Mr. Bhattacharjee, the learned Counsel for the respondents, that if Rule 13 is interpreted as providing that goods exported under bond are not leviable to excise duty, It will be ex-facie discriminatory since it would amount to arbitrary discrimination without rational baste, between exporters who export under bond and exporters who export on payment of excise duty and subsequently claim rebate. Execution of bond, Mr. Bhattacharjee, contended, can have no relevance for the purpose of eligibility to earn rebate or exemption from payment of excise duty. He also contended that between two interpretations of a provision, one which makes it constitutionally valid should be accepted.

38. As regards to the aforesaid contentions of Mr. Bhattacharjee, it was contended by Mr. Gupta, the Id. Counsel for the petitioners, that though both the Rules 12 and 13 deal with export, there is a basic difference between the two.

39. Under Rule 12, goods are at first removed on payment of excise duty and such goods before export, may change hands, earning thereby substantial profits

to the respective owners in the local market, whereas under Rule 13 there is not such scope or possibility. And this is likely to be the reason why only rebate is granted in the first case and total exemption in the other. However, the rules being clear in their language and without any ambiguity, it may not at all be necessary to embark into the reasonings which prompted the subordinate legislative authority to grant only rebate in one case and total exemption in the other case.

40. In my judgment the reasonings so advanced by Mr. Gupta, cannot be said to be devoid of merits.

41. It may be quite possible that in consideration of the fact that notified goods exported under Rule 12 are likely to have earned profits in the local market before exportation, only some rebate is granted in respect thereof and not full exemption as in the other case.

42. Moreover, there is another broad difference between the two Rules as to their applicability. Rule 12 has its application only in respect of those goods which have been taken out for home consumption on payment of excise duty, whereas Rule 13 applies only to non-duty paid goods which are removed directly from a warehouse or a licensed factory for exportation without their getting mixed up in the local market, The object of removal of the goods from the warehouse or the licensed factory being exportation and exportation alone, special consideration is shown in respect thereof to encourage exportation with the object of earning foreign exchange.

43. In the other case, the manufacturer or any other person or firm may be attracted to export the duty paid goods only when a notification is issued by the Central Government in exercise of powers conferred by Rules 12 and 12A of the Central Excise Rules, granting rebate of duty to goods as may be notified, in case such goods are exported.

44. So, in one case it is the notification which gives incentive to exportation for earning some rebate after the whole of the duty already paid, might have been passed on to the consumer. And in the other case the invitation remains wide open for exportation of the goods specified in the Rule itself (Rule 13) and is not dependent on the issuance of a notification.

45. Thus, Rule 13 keeps the flow of exportation unabated round the year, encouraging exportation as a trade; the incentive being total exemption from payment of excise duty. And Rule 12 invites only the casual exporters. In fact, it is Rule 13 which keeps the flow of foreign exchange constant. Rule 12 only adds to that flow from time to time as and when the Govt. may deem it necessary.

46. It cannot, therefore, be said that classification between the exporters attracted by a notification issued in exercise of powers under Rules 12 and 12A of the Rules and exporters under Rule 13, is not based on any reasonable differentia or that it has no reasonable nexus to the object sought to be achieved.

47. There is no dispute that the Central Excise authorities read the two Rules as independent provisions and allowed exportation to the petitioner No. 1 free from excise duty. The show cause notice (Annexure "A") also bears testimony to that. The notice, however, appears to be based On an order issued by the Government of India to the effect that the exporters should pay the unrebatable quantum of duty (under Rule 12) in respect of goods cleared for export under bond without payment of duty (Rule 13) for the sake of parity."

48. I do not, however, think that a statutory rule made in exercise of rule-making powers by the subordinate legislative authority, can be explained or interpreted contrary to its normal connotation by an executive order. And that being so, the show cause notice based on an executive interpretation of Rule 13, contrary to its real intent and purpose, is without any legal basis and, accordingly, bad in law.

49. As regards to the Bench decision of the Delhi High Court in Hindustan Aluminium Corporation's case (supra) I do not think that it has correctly interpreted Rule 13 of the Central Excise Rules and, accordingly, I am not in agreement with the said decision so far as it relates to the interpretation of Rule 13 vis-a-vis Rule 12.

50. It was contended by Mr. Dipankar Gupta, the learned Counsel for the petitioners, that the Central Excise authorities having allowed the petitioner No. 1 in the past to export Aluminium goods under Rule 13 without charging any excise duty and the petitioner No. 1 having exported such goods subsequently, as specified in the show cause notice on the understanding that no excise duty would be charged thereon as before, the claim for un-rebatable duty under the show cause notice is clearly barred by the principle of promissory estoppel.

51. In my judgment, the question can legitimately be raised here, since the basis of the claim is not a statutory rule amending Rule 13, but an executive order seeking to interpret the existing rule in a way different from as It was understood by the authorities in the past.

52. But here it is not really a case of promissory estoppel, since the claim itself has no legal basis as already stated and is ex-facie bad in law.

53. In fine, since the petitioner No. 1 exported the goods in terms of Rule 13 of the Central Excise Rules, which permits such exportation free from levy of any excise duty, the claim for such duty from the petitioner No. 1 on the analogy of Rule 12 and in terms thereto, is not sustainable and consequently the impugned show cause notices and all consequential orders relating thereto should stand quashed.

54. The Rule, accordingly, is made absolute.

55. There will be no order for costs.