

(1991) 09 OHC CK 0003

In the Orissa High Court

Case No : Original Jurisdiction Case No. 1163 of 1985

Indian Metals and Ferro Alloys Ltd.

APPELLANT

Vs

Asstt. Collector C.E. and Cus. (P)

RESPONDENT

Date of Decision : 17-09-1991

Acts Referred:

Central Excise Rules, 1944 — Rule 173(Q), 173F, 173G(2), 173G(4), 52(4)
Central Excises and Salt Act, 1944 — Section 11A, 11A(1), 11A(2)
Constitution of India, 1950 — Article 14, 19(1), 226, 265
Customs Act, 1962 — Section 28
Income Tax Act, 1961 — Section 147

Citation : (1994) 46 ECC 137 : (1994) 74 ELT 802

Hon'ble Judges : G.B. Patnaik, J;A.K. Padhi, J

Bench : Division Bench

Advocate : B.K. Mohanti, for the Appellant; Ashok Mohanti, for the Respondent

Final Decision : Dismissed

Judgement

G.B. Patnaik, J.—The notice issued to the petitioner No. 1 Company by the Assistant Collector of Central Excise and Customs u/s 11A(1) of the Central Excises & Salt Act (hereinafter referred to as the "Act"), annexed as Annexure-2, has been assailed by the petitioners in this writ application. By the said notice, the Petitioner-company has been called upon to show cause as to why a duty of central excise amounting to Rs. 5,76,180/- should not be paid by the petitioner on 540 metric tonnes of charge-chrome valued at Rs. 52,38,000/- at the rate of Rs. 9,700/- per metric tonne u/s 11A(1) of the Act and a duty of central excise amounting to Rs. 2,50,450/- should not be paid by the petitioner on 2,504.5 metric tonnes of charge-chrome slag valued at Rs. 25,04,500/- at the rate of Rs. 1000/- per metric tonne under said Section 11A(1) of the Act and further why a penalty should not be imposed on them under Rule 173(Q) of the "Rules" for the period 1-4-1983 to 5-8-1983. The notice issued by the Assistant Collector required that the cause should be shown to the Collector, Central Excise and Customs, Bhubaneswar, within thirty days of the receipt of the notice.

2. In the writ application, the petitioners assail the impugned notice on the grounds: -

(i) bias and harassment on the part of the issuing authority;

(ii) the notice is barred by limitation u/s 11A of the Act;

(iii) the Assistant Collector has no power to direct a show cause to be filed to the Collector and the Collector has no power to entertain and receive the show cause and determine the dispute; and

(iv) the notice issued is discriminatory de hors the Excise Act and affects the petitioner's business and is consequently hit by Articles 14, 19(1)(g) and 265 of the Constitution.

In course of hearing of the writ application, in view of the amended provisions of Section 11A(1) & (2) of the Act, the petitioners did not press the ground No. (iii) above nor did the petitioners advance any argument as to how the notice was discriminatory and hit by Articles 14, 19(1)(g) and 265 of the Constitution. But the learned counsel for the petitioners argued at great length ground Nos. (i) and (ii) above and in addition also urged that the conditions precedent for exercise of power u/s 11A of the Act not having been satisfied, the impugned notice was without jurisdiction.

Mr. Ashok Mohanty, the learned Standing Counsel for the Central Government, on the other hand, has contended that a notice to show cause can be interfered with by this Court only when the Court comes to the conclusion that it has been issued by an authority having no jurisdiction or that the conditions precedent for issuance of notice are not satisfied. Since neither of these two conditions are satisfied in the present case, inasmuch as it is the Assistant Collector who has the authority and jurisdiction to issue the notice and the notice itself provides enough materials which prima facie satisfy that pre-conditions for issuance of notice were there, the impugned notice cannot be interfered with by this court in exercise of jurisdiction under Article 226 of the Constitution at the threshold and it is only on cause being shown by the petitioner, the matter has to be adjudicated upon by the adjudicating authority. According to the learned Standing Counsel, the extent of liability of the petitioner had to be decided upon only when materials are produced and that cannot be gone into by this Court at this stage of issuance of notice.

The correctness of the rival submissions requires an in-depth analysis of relevant provisions of the Act and the Rules as well as a thorough scrutiny of the impugned notice that has been issued and ultimately the law on the subject as to when a notice issued can also be interfered with by the High Court in exercise of jurisdiction under Article 226 of the Constitution. But before examining those aspects, it would be necessary to state facts in brief.

3. Petitioner No. 1 is a Company which manufactures ferro-silicon, silicon metal and charge-chrome at its plant at Therubhalli in the district of Koraput. Ferro-

silicon and silicon metal are used for manufacture of goods for domestic consumption as well as research and development activity whereas charge-chrome that is produced is devoted form making goods for 100 per cent export and, therefore, the unit producing charge-chrome is called the "export-unit." After the petitioner started manufacturing charge-chrome in its export unit, the petitioner was further encouraged by the schemes of the Government of India and ear-marked one of its furnaces for making research for the manufacture of high purity ferro-silicon charge-chrome and solar grade silicon and made an application in that regard to the concerned department of the Government of India which was also duly recognised. This fact was intimated by the petitioner to the Assistant Collector (opposite party No. 2) as early as on 11-4-1983. The petitioner filed classification list but in the said list erroneously had shown charge-chrome slag to be classified as T.I. 68 goods, but according to the petitioner the price-list filed for the period 1-4-1983 to 5-8-1983 did not show any value for the charge-chrome slag. The petitioner alleges that thereafter the excise authorities initiated several proceedings and pursued the petitioner vindictively and some of those proceedings are still pending in different higher forums. In the meantime, the petitioner received the impugned notice of the Assistant Collector dated 1-5-1985, annexed as Annexure I, and the period in question during which the petitioner is alleged to have suppressed the production of the prime product, namely the charge-chrome and unauthorisedly removed the same without payment of duty from the factory thereby contravening Rule 9(1) read with Rule 173F Rule 52(4) read with Rule 173G(2) and Rule 53 read with Rule 173G(4) of the Central Excise Rules, 1944 is between 1-4-1983 and 5-8-1983. Alleging the notice issued under Annexure 1 to be one without jurisdiction and on the face of it is barred by limitation, instead of filing the show cause, the petitioner approached this Court by preferring this application under Article 226 of the Constitution.

4. When the matter was listed for admission on 12-6-1985, this Court had issued notice on admission and hearing and also had granted interim stay of further proceedings pursuant to Annexure-1. On behalf of the Union Government an application was filed for vacating interim order, but that application stood rejected by order dated 18-12-1985. As a result of the aforesaid interim orders, the proceeding initiated under Annexure 1 still remains pending without any show-cause being filed by the petitioner.

5. Mr. Mohanti, the learned counsel for the petitioners, argues at great length that the issuance of the notice under Annexure-1 is the outcome of bias and to harass the petitioner and accordingly the same should be quashed by this Court. To establish bias of the Assistant Collector, the learned counsel places before us the averments made in paragraph 4(a) to (i) of the writ application indicating how the opposite parties have initiated different proceedings under different provisions of the Act imposing penalties and how those orders have been interfered within the higher forums either by the appellate authority or by the High Court or the Supreme Court and how some of those proceedings are still

pending before some forums. But those proceedings are not in relation to the transaction in respect of which the impugned notice to show cause has been issued and merely because the petitioner has been successful in several earlier proceedings initiated by the authorities, we are not prepared to hold bias of the Assistant Collector in issuing the impugned notice since no connection has been shown to us between the earlier proceedings and the impugned show-cause notice. An allegation of bias must be established through positive materials and after going through the averments made in the writ application, we are unable to accept the contention of Mr. Mohanti for the petitioners that the impugned notice is the outcome of bias. We would accordingly reject the first submission of Mr. Mohanti, the learned counsel for the petitioners.

6. Coming to the question that the notice on the face of it is barred by limitation, the argument of Mr. Mohanti depends upon Section 11A of the Act and according to him the notice in question not having been served within six months from the date as provided in Section 11A, the notice is barred by limitation. In support of this contention, reliance has been placed on a bench decision of this Court in O.J.C. No. 1986 of 1985 (Indian Metals & Ferro Alloys Ltd. and Anr. v. Superintendent, Central Excise & Customs and Ors.), disposed of on 7-2-1991. We have carefully gone through the aforesaid decision and in our considered opinion, the said decision is of no application to the present case. In the said case, a notice issued u/s 28 of the Customs Act, 1962 came up for consideration and the said provision is in pari materia with Section 11A of the Central Excises and Salt Act with which we are concerned in the present case. It was conceded by the learned Standing Counsel for the Union Government in the said case that the proviso to Section 28 would have no application and, therefore, the only question that arose for consideration before the Court was whether by application of the main provision of Section 28, the notice issued could be said to be barred by limitation. On the concession of the learned Standing Counsel for the Union Government and on the admitted facts, the Court came to the conclusion that the notice was barred by limitation and accordingly quashed the same. But in the present case, the stand of the Union Government as reflected in the counter affidavit as well as in course of hearing of the writ application is that the proviso to Section 11A of the Central Excises & Salt Act will apply and, therefore, the limitation is five years. Since the period in question is from 1-4-1983 to 5-8-1983, if the proviso to Section 11A is attracted, then the notice issued under Annexure-1 on 1-5-1985 cannot be held to be barred by limitation. Mr. B.K. Mohanti, the learned counsel appearing for the petitioners, argues with vehemence that the averments made in the notice itself clearly demonstrate that there is no question of any fraud, collusion or any wilful misstatement or suppression of facts and, therefore, the proviso cannot be attracted and if at all, main part of Section 11A is attracted. But on going through the show cause notice issued by the Assistant Collector, we are not in a position to accept this submission of Mr. Mohanti, the learned counsel for the petitioners. On a bare perusal of the notice, it is difficult for us at this stage to hold that the extended

period of limitation provided in the proviso to Section 11A is not attracted and that would depend upon the cause shown by the party and ultimate finding of the adjudicating authority. In that view of the matter, it is difficult for us to quash the notice on the ground of limitation. We, however, make it clear that it is open for the petitioner to raise the question of limitation before the concerned authority while filing the show cause and the concerned authority would be duty-bound to consider and answer the same on the basis of materials produced before him. The second contention of Mr. Mohanti must stand rejected.

7. The only question that survived for our consideration is whether the notice can be quashed on a finding that the conditions precedent for issuance of the notice are not satisfied. According to Mr. Mohanti for initiating a proceeding u/s 11A, the appropriate authority must have reason to believe that the duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded within the ambit of Section 11A of the Act and if the proviso is attracted then it must have to be further found that such non-levy or short-levy or erroneous refund is on account of fraud, collusion or any wilful mis-statement or suppression of facts with intent to evade payment of duty by the person concerned or his agent and, therefore, materials must exist and must be shown in the notice in question without which the notice is illegal and without jurisdiction. In support of this contention, reliance has been placed on the decision of the Calcutta High Court in the case of Ganga Saran and Sons P. Ltd. Vs. Income Tax Officer and Others, , wherein the provision of Section 147(a) of the Income Tax Act was being interpreted. The provision of Section 147(a) starts with the expression "if the assessing officer has reason to believe that an income chargeable to tax has escaped assessment for any assessment year..." and, therefore, the expression "reason to believe" was interpreted by the Calcutta High Court in the aforesaid case to mean that the belief entertained must not be arbitrary or irrational and must be reasonable and based on reasons which are relevant and material. But there is no such expression in Section 11A of the Central Excises & Salt Act with which we are concerned in the present case. We fail to appreciate how the aforesaid decision is of any assistance to the petitioner. In our considered opinion, a notice issued u/s 11A of the Act, either the main part of the proviso, can be interfered with by the court if on a plain reading of the said notice, it would transpire that the conditions precedent mentioned in the said provision have not at all been stated. On reading the impugned notice, we are unable to come to the conclusion that the notice prima facie does not contain materials for invoking jurisdiction u/s 11A of the Act. In that view of the matter, at this stage it is not possible for this Court to interfere with the notice issued by the Assistant Collector. We would accordingly reject the last submission of the learned counsel for the petitioners.

8. All the contentions raised having failed, the writ application fails and is dismissed. While dismissing the writ petition, we would, however, observe that since the petitioner has not filed any show cause on account of the interim orders passed by this Court, we permit the petitioner to file show-cause within four

weeks from today whereafter the adjudicating authority may dispose of the proceedings in accordance with law by giving an opportunity of hearing to the petitioner. With these observations, the writ application is dismissed, but without any order as to costs.

A.K. Padhi, J.

9. I agree.