
(1995) 01 P&H CK 0065

In the Punjab And Haryana At Chandigarh

Case No : Amended Civil Writ Petition No. 9811 of 1992

Indian Woolen Textiles Mills (P) Ltd.

APPELLANT

Vs

Collector of Central Excise and Another

RESPONDENT

Date of Decision : 03-01-1995

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11C
Constitution of India, 1950 — Article 226, 227

Citation : (1995) 50 ECC 94 : (1999) ECR 593 : (1995) 77 ELT 847 : (1995) 110 PLR 87

Hon'ble Judges : G.S. Singhvi, J

Bench : Single Bench

Advocate : Praveen Chander Goyal, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

G.S. Singhvi, J.—This petition involves a challenge to the show cause notice dated 1.10.1986 issued to the petitioner by the Superintendent, Central Excise, Chheharta Range-II, the order dated 21.1.1987 passed by the Assistant Collector, Central Excise, Amritsar, the order dated 1.6.1989 passed by the same officer and the order dated 22.4.1992 passed by the Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi. The petitioner has prayed for quashing of the show cause notice and the impugned orders and has prayed that the order dated 19.8.1991 passed by the Collector (Appeals) Customs and Central Excise, Chandigarh be restored. He has also prayed for issue of a direction to respondent No. 2 to refund a sum of Rs. 46,845.13 along with interest @18% per annum.

2. Petitioner is a private limited company engaged in the processing of manmade fabrics. These goods were classified under the Tariff Item No. 22 (I)(b). The Central Excise Tariff Act came into force on 1.3.1986. On 21.12.1988, exemption notification was issued by the Government of India, Department of Central Excise in regard to the man-made fabrics falling under heading No. 55.08 and which were cleared during 20.2.1986 to 12.5.1986.

3. Before the issue or exemption notification, a notice dated 1.10.1986 was issued to the petitioner by the Superintendent, Central Excise, Chheharta Range-II calling upon it to show cause as to why a sum of Rs. 46,845.13 be not recovered from it on a account of short levy due to wrong classification of polyester/viscose varieties. After considering the reply filed by the petitioner, the Assistant Collector passed an order on 21.1.1987 and confirmed the demand of Rs. 46,845.13. The petitioner filed a refund application on 10.4.1987 claiming that the increased duty was to take effect from 13.5.1986 and not from 1.3.1986 and therefore, action of the departmental authorities in charging higher rate of our for the period between 1.3.1986 and 12.5.1986 was unauthorised. This claim was turned down by the Assistant Collector, Central Excise, Amritsar vide his order dated 1.9.1987 (Annexure P-5). On appeal filed by the petitioner, the matter was remanded to the Assistant Collector, Central Excise. The said authority passed a fresh order on 1.6.1989 (Annexure P-6) and it once again rejected the claim of the petitioner for refund. Once again the petitioner filed on appeal before the Collector (Appeals) Customs & Central Excise. This appeal was allowed by the said authority vide order dated 19.8.1991 (Annexure P-7). Against the order of the Appellate Authority, the department preferred an appeal before the Customs, Excise & Gold (Control) Appellate Tribunal, New Delhi. The Tribunal upheld the contention of the department that the notification granting exemption could not benefit the petitioner because the duty had already been paid by the petitioner.

4. In challenging the show cause notice and the orders passed by the Assistant Collector as well as the Tribunal, the petitioner has pleaded that the amendment made in the Tariff Heading was effective only from 13.5.1986, the date on which the Finance Bill, 1986 was made effective and therefore, it was not open to the departmental authorities to insist on recovery of the duty at the enhanced rate. The petitioner has pleaded that Finance Bill 1986 could not have been applied with retrospective effect and in fact that is also the view of Government of India as would appear from Annexure P-10.

5. I have heard Shri Praveen Chander Goyal, learned counsel for the petitioner. No one has appeared to argue the case on behalf of the respondents.

6. The only argument advanced by Shri Goyal is that the Finance bill, 1986 came into force with effect from 13.5.1986 and therefore, the duty could be charged at the higher rate with effect from 13.5.1986 and not from any earlier date. Shri Goyal submitted that the legal position had been clarified by the Government of India vide its letter dated 15.9.1986 and therefore, action of the respondents in calling upon the petitioner to deposit Rs. 46,845.13 was clearly illegal. Learned counsel argued that the Collector (Appeals) was fully justified in accepting the claim made by the petitioner but the Tribunal has arbitrarily held that refund claimed by the petitioner was not maintainable. He argued that the Tribunal has misinterpreted the provisions of Section 11C of the Central Excise and Salt Act, 1944. Shri Goyal further argued that in view of the exemption notification, the

petitioner has acquired a statutory right to get refund of the excise duty paid by it in relation to the period between 1.3.1986 and 12.5.1986.

7. A perusal of notification (Annexure P-I) undoubtedly show that duty of excise on men-made fabrics was being paid under Heading 55.12 of the schedule. By virtue of the Finance Bill 1986, the duty was enhanced. Later on, the Central Government issued notification dated 21.12.1988 and clarified that the additional duty of excise payable shall not be required to be paid in respect of such man-made fabrics, on which the said additional duty of excise was short levied during the period commencing on 28.2.1986 and ending with 12.5.1986. This exemption notification did give relief to the persons who had not paid additional duty after the coming into force of Finance Bill 1986 but there is nothing in the said notification to show that persons engaged in the manufacturing or processing of man-made fabrics became entitled to the refund of the duty already paid. Therefore, the claim of the petitioner that on the basis of notification dated 21.12.1988, it acquired a right to get refund of the excise duty paid by it cannot be accepted. In a some what similar case, Supreme Court interpreted a notification issue by the Government for waiver of the arrears of excise duty in *Union of India and Others Vs. along Ship Breakers Pvt. Ltd., Bhavnagar and Others*, and held that the expression "waiver of the arrears of excise duty" can only mean waiver of some thing which has not been paid and is payable and therefore, it would not include a case where the duty of ex- cise has already been paid and the person who has paid the duty will not be entitled to claim refund.

8. The aforesaid contention of the learned counsel advanced by him in the context of notification dated 21.12.1988 and his other contentions regarding the so-called errors in the orders passed by the Assistant Collector, Central Excise, Amritsar and the Tribunal do not merit acceptance for the simple reason that neither before the Assistant Collector and other departmental authorities nor before the Tribunal and this Court, the petitioner has pleaded that the element of higher excise duty was not passed on to the other persons. A person claiming refund of a tax or duty is under an obligation to show that the element of tax or duty regarding which he/it is claiming refund has not passed on the burden to the consumer of the goods or the other persons. The Courts cannot issue orders for refund of the tax or duty in favour of a manufacturer so as to unjustly enrich manufactures coffers. The theory of unjust enrichment has been propounded by the Supreme Court in large number of decided cases but in my opinion, reference to the cases of *Union of India and others Vs. Jain Spinners Ltd.* and another, and *Union of India and others Vs. I.T.C. Limited*, would suffice for the purpose of deciding this case. In the case of *Jain Spinners*, the Supreme Court held that the respondents are not entitled to take advantage of the order passed by the High Court on 19.2.1986 unless they succeed in showing to the statutory authorities that they had not passed on the whole or any part of the duty in question to the others. In the second case, Supreme Court has once again held that unless proof is furnished by a party to the effect that it has not passed the

burden of duty on other persons, a claim of refund of the duty cannot be allowed, the Court observed that-

"The respondent has not furnished any documentary or other evidence at all....to show that (it) did not pass on the burden of the excess excise duty to any other person. The expression "was not passed on to the customer, as explained in the illustration" is vague and non-specific. It is not stated as to at what rate the duty was collected by the respondent in the present case. The "illustrations" given in the affidavit cannot carry the matter any further nor can the same be any substitute for a clear and categoric statement of fact that the excess duty was paid by the assessee or collected from it and that its incidence was not passed on by the assessee to any other person.

Section 12(B)... creates a rebuttable presumption that every person who has paid excise duty had passed on the burden of the same to the buyers of such goods. The presumption has to be rebutted by the manufacturer who has paid the duty. The burden of proof is on the person claiming the refund to establish that he has paid the duty but not passed on the duty to the buyer of such goods. Since, this Court granted sufficient opportunity to the respondent to furnish such documentary or other evidence as it may wish to produce to establish that it had not passed on the incidence of the excise duty to the Buyers of such goods and despite the grant of that opportunity, it has failed to produce any such evidence or material and the affidavit filed by it falls completely short of the necessary averments, we would consider it futile to either remand the case to the Assistant Collector Excise or to grant an opportunity to the respondent to file a fresh application before the Assistant Collector Excise u/s 11B (1) and (2) of the Act to seek refund in the manner known to law by adducing such evidence as it required by the amended provisions of law. The failure of the respondent to produce the necessary evidence before us goes to show that the respondent has failed to rebut the presumption that it has not passed on the burden of the excise duty to any other person as envisaged by Section 12(B) of the Act."

9. In view of this legal position, it must be held that as the petitioner has failed to plead and prove that the element of excess excise duty charged by the respondents was not passed on to others, the petitioner is not entitled to any relief in this writ petition. In the result, the writ petition fails and the same is hereby dismissed.