

(1977) 08 KL CK 0023

In the High Court Of Kerala

Case No : Writ Appeal No. 276 of 1974

Inspector of Central Excise, M.O.R. and Another

APPELLANT

Vs

Goods Shepherd Rubber Co.

RESPONDENT

Date of Decision : 18-08-1977

Acts Referred:

Central Excise Rules, 1944 — Rule 10, 173A, 173B, 173C, 173D

Citation : (1978) 2 ELT 471

Hon'ble Judges : V.P. Gopalan Nambiyar, C.J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Gopalan Nambiyar, C.J.

1. The learned Judge quashed Ext. P3 series of assessment memoranda issued by the Central Excise Officer-in-charge, calling upon the writ petitioner-respondent to make goods the deficit duty that was payable in respect of the goods indicated. The notices follow almost exactly the same pattern and for the sake of convenience we may reproduce Ex. P3-A.

"ASSESSMENT MEMORANDUM

(Strike out the portions which are not applicable)

1. The assessee has paid the duty on the above goods correctly except to the extent indicated below.

The duty short levied as indicated below should be paid by the assessee with in ten days in his account current (P.L.A.)

(Sd.)

Signature and stamp of Central Excise Officer-in-charge Place : Palghat Date : 10.3.1970

Cushion compound used in the factory for the manufacture of Cushion backing Tread Rubber is dutiable. A quantity of 1885-700 Kgs. of Cushion Compound have been used in the factory during September 1969 for the manufacture of Cushion backed tread rubber.

Value of 1885-700 Kgs.

Original submitted to the ACAO, Cochin-3.

Duplicate submitted to the Supdt. of C.E. Kozhikode Circle, Kozhikode.

Triplicate forwarded to the Assessee M/s. Good Shepherd Rubber Company, Olavakkot "

The question whether duty is payable or not and whether the impugned memoranda (Ext. P3 series) had been validly or properly issued or not, falls for determination with respect to the provisions of the Central Excises and Salt Act and the Rules framed thereunder. The learned Judge took the view that the notices themselves had stated that duty had been short levied and that this was sufficient to attract R. 10 of the Central Excise Rules which reads as follows :

* * *

No notice as required under the Rule had been issued. Therefore, the learned Judge quashed the impugned memoranda and directed the authorities to proceed in accordance with law. The Collector of Central Excise has preferred this appeal.

2. The memoranda impugned are very laconic in their nature and content. On the language used in the memoranda, as there was a "short levy" and as the deficit duty had therefore to be made good, the learned Judge took the view that R. 10 was attracted. The appellant was at pains to impress upon us that there was no "short levy" so as to attract Rule 10, and the case was merely one of scrutiny and finalisation of the self assessment-return submitted by the writ petitioner in accordance With the provisions of Chapter VII-A of the Central Excises and Salt Rules, and in particular, of Rules 173-A, 173-B, 173-F, 173-G and 173-I of the Rules. To reinforce his argument, Counsel for the appellant relied on Ext. P3-A, the return filed, and the self assessment made by the assessee (which was the basis of P3-A) and supplemented by explanations to make the entries.

3. Counsel for the appellant submitted that Ex. P3-A which required the duty short-levied to be paid by the Assessee into his current account was clearly indicative of the action contemplated by Rule 173-I (2) of the Rules which reads as follows :

"173-I. (2) The duty determined and paid by the assessee under Rule 173-F shall be adjusted against the duty assessed by the proper officer under Sub-rule (1) and where the duty so assessed is more than the duty determined and paid by the assessee, the assessee shall pay the deficiency by making a debit in the account-current within ten days of receipt of copy of the return from the proper officer and where such duty is less, the assessee shall take credit in the account-

current for the excess on receipt of the assessment order in the copy of the return duly countersigned by a Superintendent of Central Excise."

4. On the other hand, Counsel for the writ petitioner respondent, stressed before us that what happened in this case was a mistake on account of mis-description or an error and therefore Rule 10 of the Rules was Clearly attracted. In order to make good the submission he relied upon the Explanation submitted by the Assessee as a sample of which, we might treat Ex. P4. The relevant portion from the said document reads thus.

In view of these notifications, the tyre retreading materials, listed below, have all been specifically brought within the purview of the Tariff Item No. 16-A (ii).-

1. Tread rubber or Camelbaek including cushion compound.
2. Cushion gum.
3. Tread gum.

The range of products manufactured by the above firm cover all these Items. The commodity "Tread rubber with Cushion Backing" marketed by the firm has lamination on one of its sides of a compound for a cushion. This compound though almost similar in appearance to cushion compound is of a slightly different composition and much cheaper in value. However, consistent with the trade practice tread rubber with backing continues to be marketed by them under the name "Tread Rubber with Cushion Backing". They have been paying the Central Excise Duty on all these products at the time of clearance of these goods and this practice was followed by them for the past 6 years. However, all of a sudden, the local Central Excise Authorities have interpreted this cheaper compound used by them for backing the tread stock as cushion compound and therefore, subject to Excise duty. As such, they are now required to take formal clearance on payment of duty of the quantity they make use of in their factory to back the tread rubber."

In the light of the above explanation, and similar returns and self assessments Counsel for the respondent submitted that having paid duty on "tread rubber" it was unnecessary for them to pay further duty on "cushion compound" or "cushion gum" which was an ingredient of tread rubber. Although mistakenly as a trade practice, they had been showing both the items as dutiable (vide for instance Ext. P4) for several years, the Department had proceeded correctly without duplicating the duty on the ingredient in addition to the compound, but had chosen to wake up and object to the return and self assessment of the assessee and point to the defect in the same and to demand the deficit duty, by the impugned memoranda.

5. Both sides pleasingly displayed their ingenuity to the maximum, the appellant to bring the case under Rule 10, and the Respondent under Rule 173-I (2) of the Central Excise and Salt Rules. The view espoused by each side seems plausible enough. For instance, the appellant would explain with reference to Ext. R3A that

while the details of the three items, tread rubber, cushion compound and under tread strips are given in twelve columns against each, against cushion compound there is an entry in column 4 marked with asterisk that 306 Kgs. had been removed from the factory, and in the remarks column that 1885 K. grams of cushion compound had been used for Calicut Mixture. It was explained that this quantity is precisely what is dealt with and assessed to duty in Ex. P3-A. Counsel for the Respondent would counter that cushion compound was an ingredient of tread rubber-Item 1 in Ext. P3-A-25760 K. gms. of which are shown to column 6 as removed from the factory, and for which a total duty of Rs. 41,811.25 is shown as paid in column 9. This it was said, would include "cushion compound" which according to counsel for Respondent is an ingredient of Tread Rubber, and merely because the assessee mistakenly showed it as a separate item in Exts R3-A the Department, it was said, would not be justified in extricating the item and subjecting it to duty Counsel for the appellant argued with force that even on the statement of the respondent the mistake, error or misconstruction, if any, was only on the part of the assessee in his return and self assessment, and not on the part of the officer, and that therefore Rule 10 of the Rules (quoted earlier) would not be attracted. We are not quite sure about this part of the argument. On the terms of the Rule, a mis-statement as to quantity or description of the goods on the part of the owner is sufficient to attract the Rule. Counsel for the respondent argued that there was a mis-statement as to the description of the goods in separately showing cushion compound as item 2 in Ext, R3-A, if it was already included as an ingredient of tread rubber shows as item 1. It was further argued that though initially the error, inadvertence or misdescription might have been on the part of the assessee in making the returns and self assessment, the mistake or mis-description etc. would stand transmuted as that of the Officer/by the super-imposition of his judicial function of making an assessment under Rule. 173-I (1) of the Rules. The said rule reads :

"173-I Assessment by proper officer.-(1) The proper officer shall on the basis of the information contained in the return filed by the assessee under Sub-rule (3) of Rule 173-G and after such further inquiry as he may consider necessary, assess the duty due on the goods removed and complete the assessment memorandum on the return. A copy of the return so completed shall be sent to the assessee."

This, according to the respondent, is sufficient to attract Rule 10. It was an interesting experience how the ingenuity of Counsel could feed a laconic and non-speaking memorandum such as Ext. P3-A with so much of substance and material. We are not satisfied however, that it is the province of this Court in Article. 226 to dress up the skeleton of an uncommunicative order by investing it with flesh and blood as attempted by Counsel on both sides. We are aware of the golden rule that where two views are plausible with respect to an order, interference under Article. 226 is forbidden, or, at any rate, would not be wise. But we are not prepared, on the position disclosed in this case, to say that the learned Judge was wrong in interfering under Article. 226. He was faced with an

order which, on the face of it recited that duty had been short levied. The process of making out that what was ex facie described as a short levy was really not so, involved a wading through the provisions of Rules 173-A to 173-I and a perusal of the returns and self assessment such as Ext. Rule 3A. Even then, the case is not a cast iron one in favour of the Department, as there is room enough to contend that there was a case for invocation of Rule. 10. In these circumstances, we see no ground to interfere with the judgment of the learned Judge. We dismiss this appeal with no order as to costs.