(1990) 09 BOM CK 0086

In the Bombay High Court

Case No : Writ Petition No. 537 of 1982

Ion Exchange (India) Ltd. — APPELLANT

Vs

Union of India — RESPONDENT

Date of Decision : 11-09-1990

Acts Referred:
Central Excise Rules, 1944 — Rule 10, 173B

Citation : (1991) 51 ELT 222

Hon'ble Judges : M.L. Pendse, J;E.D.D. Da Silva, J

Bench : Division Bench

Judgement

Pendse, J.—The petitioner No. 1 is a Company registered under the provisions of the Companies Act, 1956 and is engaged in the manufacture of various articles of plastics. The Company has factory at Ambarnath in Thane District where amongst other products, Ion exchange Resins is manufactured. The manufacture of the product is liable to payment of excise duty. Tariff Item No. 15A of the First Schedule to the Central Excises and Salt Act provides for payment of ad valorem duty at the rate of 50% in respect of manufacturer of article or synthetic resins and plastic materials thereof. Tariff Item No. 15A(2) refers to articles made of plastics, all sorts. By Notification No. 68/71 dated May 29, 1971, the Central Government exempted articles made of plastics, all sorts falling under Item No. 15A(2) from the whole of the duty of excise payable.

2. The Company filed classification lists on May 5, 1972, March 1, 1974, and August 1, 1974 under Rule 173-B classifying Ion Exchange resins under Tariff Item No. 15-A(2) and claiming exemption under Notification dated May 29, 1971. Each of the classification lists filed by the Company was approved by the Excise authorities and the classification list filed on August 1, 1974 was approved on October 1, 1974. Thereafter on October 18, 1975, the Assistant Collector of Central Excise, Kalyan Division, served show cause notice on the Company seeking classification of Ion Exchange resins under residuary Tariff Item No. 68 instead of Item No. 15A(2) of the First Schedule. The Company filed the reply,

but the Assistant Collector by order dated April 21, 1976 held that the goods manufactured by the Company attract Tariff Item No. 68. The Assistant Collector then invoked Rule 10A of the Central Excise Rules and modified the earlier approved classification list. The Company filed appeal before the Appellate Collector but the appeal ended in dismissal by order dated August 31, 1976. The revision application filed by the Company before the Government of India, Ministry of Finance, Department of Revenue, met with the same fate by order dated October 16, 1980. The orders of the three authorities below are under challenge in this petition filed under Article 226 of the Constitution of India.

3. Shri Pochkhanawalla, learned counsel appearing on behalf of the petitioners, raised three contentions to challenge the legality of the orders passed by the Excise authorities. The first submission of the learned counsel is that Ion Exchange resin is classifiable under Tariff Item No. 15A(2) and the Company was entitled to avail of the exemption, The learned counsel urged that the conclusion recorded by the authorities below that Tariff Item No. 68 which is a residuary entry is attracted is incorrect : The second submission of the learned counsel is that the conclusion of the Assistant Collector that Ion Exchange resin is liable to payment of excise duty under Tariff Item No. 68 can be only prospective and consequently, the provisions of Rule 10A are not attracted and the Assistant Collector could not have demanded duty under Tariff Item No. 68 for the period commencing from March 1, 1975 and ending with April 25, 1976. The third submission of the learned counsel is that even assuming that the provisions of Rule 10A are attracted, still as statutory requirements of the Rule are not complied with the action of the Assistant Collector demanding duty cannot be sustained. In our judgment, it is not necessary to examine the first two submissions as the Company must succeed on the third submission as regards failure to comply with the statutory requirements of Rule 10A before demanding escaped duty from the Company.

4. Though the authorities below have held that Ion Exchange resin is classified under Tariff Item No. 68 and not under Tariff Item No. 15A (2) of the First Schedule, it must be pointed out that on September 22, 1977, the Assistant Collector served show cause notice upon the Company to explain why the goods should not be held to be classifiable under Tariff Item No. 15A(1)(ii). The authorities below proceeded on the footing that manufacture of Ion Exchange resin is liable to payment of duty under Tariff Item No. 68 with effect from March 1, 1975 to April 24, 1976 and the Assistant Collector directed the Company to pay duty at the rate of 1% ad valorem on the clearance of the resins under Rule 10A of the Central Excise Rules, 1944. Rule 10A deals with residuary powers for recovery of sums due to the Government and, inter alia, provides that where rules do not make any specific provision for the collection of any duty, or of any deficiency in duty if the duty has for any reason been short levied, the proper officer may serve a notice on the person from whom such duty, deficiency in duty is recoverable requiring him to show cause why such person should not pay the amount specified in the notice. The Assistant Collector, in the present case,

exercised powers under Rule 10A and directed the Company to pay duty alleged to have been short levied but without complying with the requirement of Rule 10. The rule demands service of notice specifically setting out the amount of duty short levied and calling upon the person liable to pay duty to show cause why such sum should not be made payable. Shri Desai, learned counsel appearing on behalf of the Department, very fairly stated that notice under Rule 10A of the Rules was never served on the Company and consequently, the Assistant Collector could not have demanded duty alleged to be short levied. In our judgment, the failure to issue notice under Rule 10A is fatal to the order passed by the Assistant Collector demanding duty. The reliance by Shri Pochkhanawalla on the decision reported in 1980 (6) E.L.T. 692 Simmonds Marshal Ltd. Vs. M.R. Baralikar, Assistant Collector of Central Excise, Pune and others, Simmonds Marshal Ltd. v. M. R. Baralikar, Assistant Collector of Central Excise, Pune and Others in this respect is very appropriate. In our judgment, the impugned orders cannot be sustained for failure to comply with the statutory requirements of Rule 10A.

5. Accordingly, petition succeeds and the order passed by the Assistant Collector, Kalyan on April 21, 1976 and confirmed by the Appellate Collector on August 31, 1976 and by the Government of India in revision on October 16, 1980 are set aside and the proceedings commenced by the Assistant Collector by service of show cause notice dated October 18, 1975 are quashed. In the circumstances of the case, there will be no order as to costs. The Company would be entitled to consequential relief of refund of duty recovered in pursuance of the orders which are set aside. The Company is not entitled to any interest on this amount but the refund must be paid on or before December 31, 1990.

