
(1986) 07 BOM CK 0029
In the Bombay High Court
Case No : Writ petition No. 1662 of 1982

IVP Ltd. and another

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 17-07-1986

Acts Referred:

Central Excises and Salt Act, 1944 — Section 36(2)

Citation : (1986) 10 ECC 68 : (1988) 15 ECR 115 : (1986) 25 ELT 615

Hon'ble Judges : M.L. Pendse, J

Bench : Single Bench

Judgement

1. The question which falls for determination in this petition filed under Article 226 of the Constitution of India is whether hardened or hydrogenated oils having melting point of 41 Degree C are to be classified under Tariff Items Nos. 12, 13 or residuary Item No. 68 of the First Schedule to the Central Excises and Salt Act, 1944. The question comes up for consideration in the following circumstances.

2. The petitioner No. 1 is a Joint Stock Company governed by the provisions of the Companies Act and are running a factory situated at Ghodapdeo, Bombay, manufacturing vegetable products, such as vegetable oils, hardened technical oils, etc. The vegetable non-essential oil is hardened to a melting point higher than 41 Degree C and the oils are not capable of human consumption but are purely meant for industrial purposes. The hydrogenated oil is used within the factory for internal consumption in the manufacture of soap. Oils or fats consist predominantly of glycerine esters of fatty acids. The word "oil" is used for triglycerides that are liquid at ambient temperatures. Apart from the physical appearance, there is no distinction between oil and hydrogenated oil and the hydrogenated oil still retains the characteristics of oil even after hardening. Prior to April 1978, petitioner No. 1 was classifying the hardened vegetable oil for the purpose of levy of excise duty as falling under Tariff Item No. 13. Tariff Item No. 13 reads as under :

"Item	No.	13	-	VEGETABLE	PRODUCTS
Description	Rate	of		Item No.	Tariff Duty
				1.	2. 3.
				13.	Vegetable

Product - 10% ad valorem "Vegetable Product" means any vegetable oil or fat which, whether by itself or in admixture with any other substance, has by hydrogenation or by any other process been hardened for human consumption."

----- The petitioners felt that the classification under Tariff Item No. 13 was to accurate and the hardened vegetable oil would fall within the ambit of Tariff Item No. 12. Tariff Item No. 12 reads as under :

"Item	No.	12	-	VEGETABLE	NON-ESSENTIAL	OILS
Description	Rate	of		Item No.	Tariff Duty	
				12.	Vegetable	

non-essential oils - Rs. 100.00 All sorts, in or in relation to the per metric manufacture of which any process tonne. is ordinarily carried on with the aid of power. N.B. - For duty leviable under the Produce Cess Act, 1966, please see at the end of this Schedule."

----- 3. Accordingly, on April 22, 1978, the petitioners submitted a revised classification list for the hardened vegetable oil before the Assistant Collector of Central Excise classifying the article as excisable under Item No. 12. The Assistant Collector of Central Excise by order dated May 4, 1978 rejected the said classification list on the ground that no product would fall under Tariff Item No. 13 if the contention of the petitioners is accepted. The Assistant Collector of Central Excise also held that as the petitioners have classified the product under Tariff Item No. 13 for a considerable period, it is not possible to classify it under Tariff Item No. 12. The petitioners sought clearance on payment of duty under protest and preferred an appeal before the Appellate Collector of Central Excise.

The Appellate Collector of Central Excise allowed the appeal by order dated March 20, 1980 holding that the product was classifiable under Tariff Item No. 12. The Appellate Collector placed strong reliance upon the decision of the Supreme Court in the case of Tungabhadra Industries Ltd. Vs. The Commercial Tax Officer, Kurnool, to record a finding that hardened vegetable oil does not cease to be vegetable oil by the process of hardening. The Appellate Collector disagreed with the order of predecessor holding that the product is classifiable neither under Tariff Item No. 12, nor under Tariff Item No. 13, but under residuary Item No. 68 which refers to "goods not elsewhere specified."

4. In October 1980, the Union of India served show cause notice on the petitioners to explain why product should not be classified under Tariff Item No. 68. This suo-moto notice was issued in exercise of revisional jurisdiction. After

the petitioners sent reply, the Additional Secretary to Government of India, passed order dated August 17, 1981 in exercise of powers vested u/s 36(2) of the Act and the order of the Appellate Collector was set aside and it was concluded that hardened hydrogenated oils are classifiable under Item No. 68. The order of the revisional authority is under challenge in this petition.

5. Shri Wahanvati, learned counsel appearing on behalf of the petitioners, submitted that the revisional authority was in error in disturbing the order of the Appellate Collector for more than on reason. The learned counsel urged that the revisional authority could not have exercised powers u/s 36 as a period of six months had expired from the date of order of the Appellate Collector at the time of issue of show cause notice. Apart from the contention that the revisional proceedings were barred by limitation, even on merits, says the learned counsel, the order is wholly unsustainable. Shri Wahanvati argued that the material on record was more than enough to establish that the product of the petitioners clearly falls under Tariff Item No. 12. The first submission of the learned counsel that the proceedings commenced by the revisional authority was barred by limitation is not accurate. As mentioned hereinabove, the Appellate collector passed the order on March 20, 1980, while the show cause notice u/s 36(2) of the Act was issued on October 23, 1980 i.e. obviously beyond a period of six months. Shri Wahanvati submits that u/s 36(2) of the Act, the Government could review the order of the Appellate authority only if the proceedings are commenced within six months from the date of passing of the order in appeal. The submission of the learned counsel is not correct. The second proviso to Section 36(2) prescribes that no proceedings shall be commenced under this sub-section after the expiration of period of one year from the date of the order. The third proviso to Section 36(2) prescribes that no order levying or enhancing the duty where the Government is of the opinion that any duty of excise has not be levied or has been short levied shall be made unless the person affected by the proposed order is given notice within the time limit specified in Section 11A. The time limit prescribed u/s 11A is six months and relying on the third proviso to Section 36(2) of the Act, Shri Wahanvati claims that the proceedings commenced by the revisional authority were barred by limitation. It is not possible to accept this submission because the third proviso would be applicable only in those cases where excise duty is not being levied or short levied and the second proviso does not relate to failure to levy duty or short levy of duty but concerns with the accurate classification of the product manufactured by the petitioners. In my judgment, in such cases the second proviso to sub-section (2) of Section 36 is applicable and, therefore, the proceedings commenced within a period of one year were clearly within the period of limitation. The first submission of the learned counsel must, therefore, fail.

6. Shri Wahanvati is right in his contention that the revisional authority was clearly in error in concluding that the product manufactured by the petitioners falls under Tariff Item No. 68 which is residuary item. The Superintendent of Central Excise felt that hydrogenated vegetable oil would attract Tariff Item No.

13 and that finding was set aside by the appellate authority and also by the revisional authority, and, in my judgment, very correctly. The plain reading of Tariff Item No. 13 indicates that the vegetable product which falls under this item must be one for human consumption. It is not in dispute that the product manufactured by the petitioners is used only for the industrial purposes and not for human consumption and, therefore, the Tariff Item No. 13 could not have been attracted. The question which then remains for determination is whether Tariff Item No. 12 or Tariff Item No. 68 would be applicable to the products manufactured by the petitioners. It is now well-settled that resort cannot be made to residuary article as long as the product manufactured comes within the ambit of any other tariff item. It is necessary, therefore, to ascertain whether Tariff Item No. 12 is applicable for levy of excise duty in respect of hardened vegetable oil. Shri Wahanvati submits and, in my judgment, with considerable merit that Tariff Item No. 12 brings in its sweep vegetable non-essential oils of all sorts and the expression "all sorts" would bring in its ambit hydrogenated oil. Shri Wahanvati submits that there is hardly any distinction between vegetable oil in liquid form and the hydrogenated oil which is hardened with a melting point higher than 41 Degree C. Apart from the distinction in the physical appearance, there is no distinction between oil and hydrogenated oil. The submission of Shri Wahanvati is well supported by the decision of the Supreme Court in Tungabhadra's case (supra). The Supreme Court turned down the submission of the Advocate General that while normally oil was a viscous liquid, the hydrogenated oil was semi-solid and this change in its physical state was itself indicative of a substantial modification of the identity of the substance. The Supreme Court pointed out that several oils are viscous fluids, but they do harden and assume semi-solid condition on the lowering of the temperature. The Supreme Court gave illustration of groundnut oil which is at normal temperature a fluid, but assumes semi-solid condition if kept for long enough time in refrigerator. From the decision of the Supreme Court, it is obvious that hydrogenated oil is nothing but hardened vegetable oil and would fall within the ambit of Tariff Item No. 12 for the purpose of excise duty. Apart from the decision of the Supreme Court, the petitioners produced affidavits of Dr. Laxminarayana and Dr. Rebello to establish that the hydrogenated oil continues to be regarded as oil in the technical sense as well as in the trade circles. The Appellate Collector had relied upon the affidavits filed by Dr. Laxminarayana and Dr. Rebello and had come to the conclusion that the hydrogenated oil still continues to be a vegetable oil and is accordingly known in the trade circles. On this material, the decision of the Appellate Collector could not have been faulted with.

7. The revisional authority disturbed the order of the appellate Collector only because of the earlier order passed in the case of Hindustan Lever. The copy of that order is annexed as Ex. I to the petition and the order was passed on October 29, 1980. In the case of Hindustan Lever, the revisional authority took the view that hydrogenated oil would not fall under Tariff Item No. 12, but under

residuary Item No. 68. In arriving at this conclusion, the revisional authority brushed aside the decision of the Supreme Court in *Tungabhadra's* case (supra) by observing that the judgment was delivered in a case arising under the provisions of the Sales Tax Act. The revisional authority further held that while interpreting items under taxing statute, resort should not be to scientific or technical meaning of such items, but to the popular meaning attached to them by those dealing in those articles; in other words, to their commercial sense. The revisional authority observed that in the trade, the hardened oils with melting point above 45 Degree C would be recognised as commodity distinct from vegetable oil. Shri Wahanvati complains that this observation was made by the revisional authority in the case of Hindustan Lever without any material whatsoever on record. The learned counsel urged that the revisional order does not reflect as to what was the material on which the conclusion could have been recorded that in the trade, the hardened oil is known as a commodity distinct from vegetable oil. I enquired from Shri Rege, learned counsel appearing on behalf of the respondents, as to whether there is any material to establish that fact and Shri Rege very fairly stated that there is none. It is obvious that the revisional authority while passing the order in the case of Hindustan Lever had ignored the relevant facts and has proceeded on assumption which was totally unfounded. The revisional authority was clearly wrong in ignoring the judgment of the Supreme Court in *Tungabhadra's* case on untenable ground.

While dealing with the case of the present petitioners, the revisional authority merely observed that the Government had already held in the case of Hindustan Lever that hydrogenated oil was classifiable under Tariff Item No. 68 and as the order passed in the case of Hindustan Lever does not indicate any reason to reach that conclusion, the order passed in the present case by the revisional authority must fall to the ground.

8. There is one more circumstances which was pointed out by Shri Wahanvati during the hearing of the petition. Shri Wahanvati pointed out that an identical question arose for consideration before the CEGAT and the Full Bench of five members came to the conclusion, after considering all the previous orders passed by the Government and various judgments of the Supreme Court and the High Courts, that hydrogenated oil continues to remain as vegetable oil and is classifiable under Tariff Item No. 12 and not under Tariff Item No. 13, or Tariff Item No. 68 as claimed by the Department. The decision of the Tribunal is reported in 1986 (24) Excise Law Times, 290, *Tata Oil Mills Co. Ltd., V/s. Collector of Central Excise, Madras*. Shri Wahanvati made reference to this decision of the Tribunal only to high-light that the observation of the revisional authority that hydrogenated oil is known as a different or distinct product from the vegetable oil in the trade circle is not accurate. In my judgment, the order of the revisional authority cannot be sustained and so also the show cause notice issued pursuant thereto on August 5, 1981 and the copies of which are annexed as Exs. K, L, and M to the petition.

9. Accordingly, petition succeeds and the rule is made absolute in terms of prayer b(i), (ii) and (iv). The respondents are directed to ascertain what was the duty payable under Tariff Item No. 12 on the product manufactured by the petitioners with effect from April 22, 1978 till today and thereafter calculate the amount of excess duty paid by the petitioners either under Tariff Item No. 13 or Tariff Item No. 68, either under the order passed by the respondents or in accordance with the interim order passed by this Court and thereafter refund excess duty paid by the petitioners. The respondents shall complete the process of calculation and refund the amount to the petitioners within a period of three months from today. In the circumstances of the case, there will be no order as to costs.