

(1991) 08 AHC CK 0083

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 1380 (T) of 1987

Kanpur Cigarettes Pvt. Ltd.

APPELLANT

Vs

Collector of Central Excise and Others

RESPONDENT

Date of Decision : 14-08-1991

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A

Citation : (1992) 38 ECR 325

Hon'ble Judges : B.P. Jeevan Reddy, C.J.;R.A. Sharma, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

B.P. Jeevan Reddy, C.J.—This writ petition is directed against a show cause notice dated 4.4.1986 (as amended on 24.4.1986) issued in the name of the Superintendent (Prev.) Central Excise Kanpur Division-1.

2. The show cause notice avers the following facts: On the basis of information received, a team of Divisional Preventive Officers of Central Excise Division-1, Kanpur visited the premises of the petitioner M/s Kanpur Cigarettes (P) Ltd. engaged in manufacture of cigarettes falling under Tariff Item No. 11(2) of the First Schedule, to the Central Excises and Salt Act 1944, on 7.10.1985. They inspected the cigarette stocks and the books maintained by the petitioner. Several irregularities and infractions of rules were discovered, which constitute the basis of the impugned show cause notice. The show cause notice proposes three separate and distinct actions. As per the original show cause notice the actions proposed are:

(i) Imposition of a penalty under Rules 9, 52A, 210 and 226 of the Central Excise Rules 1944.

(ii) Confiscation of seized 54 C.F.C. containing 6,48,000 Panama Virginia 20s Cigarettes under Rules 9,210 and 226 of the Central Excise Rules 1944.

(iii) Demand of duty on 78,76,960 Panama Virginia 20s Cigarettes under Rule 9 of Central Excise Rules 1944.

3. However, by the corrigendum-notice dated 24.4.1986 Clause (iii) above was substituted. As modified (amended) Clause (iii) calls upon the petitioner to show cause why duty on 78,76,960 (numbers) Panama Virginia 20s cigarettes cleared otherwise than as provided under Central Excise Rules should not be demanded under Rule 9(2) of Central Excise Rules 1944 read with Section 11A of the Central Excises and Salt Act 1944. The corrigendum notice has also been issued in the name of the Superintendent.

4. Mr. Raja Ram Agarwal, learned Senior Counsel appearing for the petitioner urged the following contentions:

(1) The impugned notice issued by the Superintendent Central Excise is incompetent and invalid. The notices were issued beyond six months from the relevant date. In such a case, the notice can be issued only by the Collector Central Excise as specified in the proviso to Section 11A(1). The notice is accordingly liable to be quashed on this ground alone.

(2) Even where the show cause notice is issued within six months, it can be issued only by the Collector (and not by any other Central Excise Officer) if it alleges any of the grounds mentioned in the proviso to Section 11A(1). For this reason too, the notice is liable to be quashed.

(3) The show cause notice should specify the amount proposed to be demanded. This is evident from the language employed in Sub-section (2) of Section 11A. The impugned notice does not.

(4) The transfer of the proceedings to the Director (Legislation and Adjudication) Central Excise, Department of Revenue, Government of India, New Delhi, and the conferment of powers of Collector upon the Director are both incompetent and invalid in law.

5. On the other hand, Sri Markandey Katju, learned Counsel for the respondents contended that the notice in this case was in fact issued by the Collector though it was communicated in the name of the Superintendent Central Excise. He placed the relevant record before us to establish his contention. He disputed the correctness of the various submissions made by the learned Counsel for the petitioner.

6. The learned Counsel for the petitioner did not choose to argue the fourth submission in view of the decisions of the Madras, Calcutta and Delhi High Courts reported in 33 E.L.T. 211 : I.T.C. Ltd. and Another Vs. Union of India (UOI) and Others, and Duncan Agro Industries Ltd. Vs. Union of India, respectively. He, however, made it clear that he does not concede the correctness of the said decisions but would reserve the same for an appropriate occasion or an appropriate court, as the case may be. We are, therefore, left only with the first three contentions urged by learned Counsel for the petitioner.

7. For a proper appreciation of the contentions urged by Sri R.R. Agarwal, it would be appropriate to read Section 11A. It reads:

11-A. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded.-(1) When any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, a Central Excise Officer may, within six months from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the refunds has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

Provided that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud, collusion or any willful misstatement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by such person or his agent, the provisions of this sub-section shall have effect, as if for the words "Central Excise Officer" the words "Collector of Central Excise" and, for the words "six months", the words "five years" were substituted.

Explanation.-Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of six months or five years as the case may be.

(2) The Assistant Collector of Central Excise or, as the case may be, the Collector of Central Excise shall, after considering the representation, if any, made by the person on whom notice is served under Sub-section (1), determine the amount of duty of excise due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined.

(3). For the purposes of this section.-

(i) "refund" includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(ii) "relevant date" means:

(a) in the case of excisable goods on which duty of excise has not been levied or paid or has been short-levied or short-paid-

(A) Where under the rules made under this Act a monthly return, showing particulars of the duty paid on excisable goods removed during the month to which the said return relates, is to be filed by a manufacturer or producer or a licensee of a warehouse, as the case may be, the date on which such return is so filed;

(B) where no monthly return as aforesaid is filed, the last date on which such

return is to be filed under the said rules;

(C) in any other case, the date on which the duty is to be paid under this Act or the rules made thereunder;

(b) in a case where duty of excise is provisionally assessed under this Act or the rules made thereunder, the date of adjustment of duty after the final assessment thereof;

(c) in the case of excisable goods on which duty of excise has been erroneously refunded, the date of such refund.

8. The proviso to Sub-section (1), as it stands now, was amended by Central Excises and Salt (Amendment) Act with effect from 27.12.1985. It is by this Amendment that for the words "Central Excise Officer" the words "Collector of Central Excise" were substituted.

9. The first contention of the learned Counsel for the petitioner is based upon the assumption that the show cause notice is issued beyond the period of six months prescribed by Section 11A(1) of the Act. As we shall presently point out, this assumption is not well-founded. Secondly, as pointed hereinbefore, the notice is not only issued u/s 11A (demanding the duty not paid or short-paid), but it also proposes to levy penalties under Rules 9, 52A, 210 and 226. Rule 9(2) provides that "if any excisable goods are, in contravention of Sub-rule (1), deposited in or removed from, any place specified therein, the producer or manufacturer thereof shall pay the duty leviable on such goods upon written demand within the period specified in Section 11A of the Act by the proper officer and shall also be liable to a penalty which may extend to two thousand rupees, and such goods shall be liable to confiscation." What would be the relevant date from which the six months period should be computed under Rule 9(2)? Would it not be the date on which the illegal deposit or illegal removal is discovered? Is it possible or permissible to read the definition of "relevant date" in Clause (ii) of Sub-section (3) of Section 11A into Rules 9(2) merely because Rule 9(2) imports the period of limitation specified in Section 11A. Similarly, Rule 52A provides that "no excisable goods shall be delivered from a factory except under a gate-pass signed by the owner of the factory and counter-signed by the proper officer." Sub-rule (5) provides for penalty and confiscation of goods, in cases of violation of the said requirement. No period of limitation is prescribed in Sub-rule (5) of Rule 52A. It does not even prescribe who is the proper authority to levy the penalty and/or to confiscate the goods thereunder. Rule 210 provides generally that "a breach of these Rules shall, where no other penalty is provided herein or in the Act, be punishable with a penalty which may extend to one thousand rupees and with confiscation of the goods in respect of which the offence is committed." This Rule does not prescribe: any period of limitation, nor does it specify the authority competent to levy the penalty and/or to confiscate the goods. Rule 226 prescribes the manner in which books shall be maintained by a manufacturer. At the same time, it provides that any person, who fails to maintain the books in

the manner prescribed, shall be liable to penalty which may extend to two thousand rupees and further all the goods of which due entry has not been made in such book, account or register, shall be liable to confiscation. This Rule also does not prescribe any period of limitation. Evidently, the period of limitation under all these Rules would be the date, on which the illegality or the infraction of the Rule is discovered. From this point of view, we find it difficult to say that the show cause notice as a whole is barred by limitation. Now coming back to Section 11A, we find it difficult to record any finding at this stage, in this writ petition, that the show cause notice is barred even u/s 11A. Several instances of evasion of duty are mentioned in the show cause notice. Para 2 of the show cause notice refers to certain irregularities having been committed during the period 30.9.1985 to 6.10.1985. Para 3 again refers to certain other irregularities committed during the same period, i.e., during the week ending on 6.10.1985. Several paragraphs in the show cause notice refer to various periods during which irregularities and infractions are said to have taken place, which have given rise to the demand in question. In respect of each instance, the relevant date may be different. Suffice it to say that it is not possible to say that, *ex facie*, the show cause notice is barred by limitation and if so, we cannot interfere by way of a writ petition at this stage. We think it necessary to reiterate that under the show cause notice, not only the duty is sought to be demanded but penalties are also sought to be levied and the goods are also sought to be confiscated. The confiscation of goods and levy of penalties is under various Rules and we have already pointed out hereinabove that action under these Rules is neither governed by any period of limitation, nor can it be said that the notice thereunder is barred by limitation, even assuming that six months' limitation applies. (As we have mentioned hereinabove, from the relevant date, i.e., the date on which the irregularities were discovered, the show cause notice is within the period of six months.) In such state of affairs we decline to interfere at this stage of the proceedings. Let the petitioner submit his explanation and orders be passed according to law, where-after it shall be open to him, if he is aggrieved by the final orders that are passed, to adopt such remedies as are open to him under law.

10. We may point out that it is not disputed that the Superintendent of Excise, in whose name the show cause notice is issued, is a Central Excise Officer within the meaning of Section 11A(2). At this stage, we think it necessary to refer to a submission made by Sri Markandey Katju, learned Counsel for the respondents, that the present notice has been, and must be deemed to have been, issued by the Collector alone. He says that the show cause notice, though issued in the name of the Superintendent, calls upon the petitioner to show cause to the Collector. Secondly, he points out that after issuing the show cause notice, the matter was referred to the Collector, who agreed with the Superintendent's action in issuing the show cause notice and further directed that the notice should specifically invoke Section 11A. It is in accordance with the said endorsement that a corrigendum notice was issued specifically mentioning

Section 11A. Not only the original notice was ratified by the Collector, the Counsel says, but that issuance of corrigendum notice in pursuance of the directions of the Collector makes the notice one issued by the Collector himself. According to him, it was only communicated by the Superintendent. We do not, however, wish to express any opinion on this question.

11. In view of the opinion expressed by us hereinabove, it is not necessary for us to express any opinion on the second or third contention urged by the learned Counsel for the petitioner. The petitioner can raise all these contentions, if he is so advised, in his explanation to the show cause notice.

12. For the above reasons, the writ petition fails and is dismissed. There shall be no orders as to costs.