
(1997) 06 KAR CK 0020
In the Karnataka High Court
Case No : Writ Petition No. 10459 of 1988

Kirloskar Computer Service Ltd.

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 30-06-1997

Acts Referred:

Central Excise Act, 1944 — Section 11 A, 11 C, 13, 2, 3
Constitution of India, 1950 — Article 226

Citation : (1998) 98 ELT 355

Hon'ble Judges : Tirath S. Thakur, J

Bench : Single Bench

Advocate : Shri G. Chandra Kumar, for the Appellant; Shri Ashok Haranahalli, CGSC, for the Respondent

Judgement

Shri Tirath S. Thakur, J.—In this petition for a writ of certiorari the petitioner company calls in question the validity of a Notice issued by the Collector of Central Excise, Bangalore; thereby the petitioner has been asked to show cause why Central Excise Duty in respect of goods manufactured and cleared by it be not recovered and a penalty imposed. Also under challenge is a Notification dated 1st of March, 1988 levy excise duty on Software at the rate of 10% ad valorem under Chapter heading 85.24 of the Central Excise Tariff Act, 1985.

2. The petitioner is engaged in the business of Data Processing and providing Software, Development Services for domestic and export markets. These activities inter alia involve system Development, System designing, Programme Development, Master File creations, Data preparation, Data processing, Data version and punching etc. The petitioner's case is that collection of data or information and transferring the same on the floppy cannot be said to be goods manufactured by the petitioner nor can the process of transcribing information on the floppies to meet the varied needs of the customers concerned, be said to involve any process of manufacture within the meaning of Section 3 of the Central Excises and Salt Act, 1944. Search operations were all the same

conducted by the Excise Authorities, on the business premises of the petitioner on 16th and 23rd February, 1988, resulting in seizure of a larger number of invoices, Books and other documents; and culminating in the issue of a show cause notice dated 25th February, 1988, pointing out to the petitioner Company that it was engaged in developing software, Software packages and Data processing which were cleared, either on recorded media like magnetic tapes floppy, Discs or captively consumed. The show cause notice further pointed out that the petitioner Company was entering into contracts with various Companies for Software development and data processing and for the said purpose unrecorded floppies are supplied to it by the customers or purchased by the petitioner from the open market on which the petitioner performs one or more of the activities mentioned earlier. The Notice alleged that the petitioner had wilfully suppressed the fact of manufacture of recorded media and cleared the goods clandestinely without accounting for the same in the Statutory Records, filing classification and price lists and without raising Central Excise Gate passes or payment of Central Excise Duty. It therefore proposed to levy excise on the goods manufactured and cleared by it besides a penalty as per the Central Excise Rules. The petitioner was called upon to show-cause why the action proposed in the show-cause notice be not taken against it. Aggrieved the petitioner has filed the present writ petition assailing the validity of the Notice as also Notification dated 1st of March, 1988, referred to earlier.

3. Mr. Chandra Kumar, learned Senior Counsel appearing for the petitioner confined his challenge to the show cause notice only and made a three fold submission in that regard. Firstly, he argued that the show-cause notice is so far as it proposes to levy Excise Duty on the goods allegedly manufactured by the petitioner during the period 28th February, 1986 to 3rd of February, 1988 was illegal and incompetent having regard to the fact that by a Notification issued by the Central Government u/s 11C of the Central Excises and Salt Act, 1944 excise duty on Computers Software, in the form of recorded media had been exempted. Inasmuch as the show cause notice did not take note of the said exemption and proposed to levy excise duty during the period covered by the exemption Notification, the same was illegal and without jurisdiction. Secondly he argued that the show cause notice issued by the Authority was barred by limitation in so far as the same proposed to levy a duty on goods cleared more than six months prior to the date of its issue. The extended period of limitation, argued Mr. Kumar, could be invoked by the Collector only if it was alleged that the petitioner had fraudulently or with the intent to evade duty made a willful misstatement or suppression of facts. No such fraud, collusion, misstatement, or suppression was, according to the learned Counsel, alleged against the petitioner with an intent to evade duty, so that the extended period of limitation for recovering the unpaid duty was inapplicable. Thirdly, he argued that in order to attract duty u/s 3 of the Central Excises and Salt Act, not only should it be shown that the petitioner had manufactured goods but that the said goods were excisable. He urged that even if the department were to bring the petitioner's case in the residuary item of the

1st Schedule to the Central Excises and Salt Act, or the Tariff Act, 1985, yet it was essential for the Authorities to establish further that what was sought to be subjected to duty were "goods" and that the same were manufactured by the petitioner. Relying upon the decision of the Supreme Court, in *Union of India (UOI) Vs. Delhi Cloth and General Mills, , Bhore Industries Ltd., Bombay Vs. Collector of Central Excise, Bombay, , Moti Laminates Pvt. Ltd. and Others Vs. Collector of Central Excise, Ahmedabad*, he argued that the activities undertaken by the petitioner did not amount to carrying out a process of manufacture so as to attract any duty on the same. He also placed heavy reliance upon a decision of the Supreme Court in *Prabhat Sound Studios v. Additional Collector of Central Excise* 1996 (68) ELT 635 : 1997 (68) ECR 764 in support of his submission that just as recording of sound on duty paid magnetic tapes, did not amount to manufacture so also development of software packages and data processing and activities related thereto could not be treated to be tantamount to manufacture to attract duty.

4. Mr. Ashok Haranahalli, learned Senior Standing Counsel for the Central Government on the other hand contended that in so far as the show cause Notice proposed to levy a duty for the period covered by the exemption Notification issued u/s 11C, the same could be deemed to be redundant. He submitted that the software packages and data processing activities undertaken by the petitioner amounted to carrying out a process of manufacture particularly when such process resulting in the production of recorded media was carried on a commercial scale and at a considerable price. The fact that the requirements of no two clients for whom the petitioner carried on such activities may be similar did not, according to the learned Counsel make any difference. The recorded media were according to the Respondents goods as per the description heading 85.24 and were sold in the market as a valuable commodity. The value of any such recorded media, it was contended included not only the cost of blank medium on which the recording takes place but also the instructions, knowledge, information and data that is recorded on it. He urged that for the period subsequent to the show cause Notice, such recorded media and computer software had been exempt from payment of duty in terms of Notifications issued u/s 5A from time to time. These Notifications argued the learned Counsel, required the petitioner to file declarations which the petitioner had filed on the clear premise that recorded media and software development programmes constitute manufacture of goods and were therefore dutiable in the absence of an exemption Notification. The petitioner could not according to the learned Counsel, take a contradictory stand in that it cannot on the one hand contend that the recorded media is neither manufacture nor goods and yet benefit from the exemption under the provisions which proceed on the basis that such software are goods manufactured by the petitioner and hence liable to excise duty. He lastly argued that the show cause notice did not itself settle any right or obligation and simply proposed to take certain action which the petitioner had all the opportunity to oppose by filing its objections both on law as also facts.

Relying upon a decision of this Court in W.P. No. 15488/1985, disposed of on 11th August, 1992, he argued that this Court need not interfere at this stage and leave the issue on merits and other aspects of the controversy raised by the petitioner to be determined in accordance with the machinery prescribed by the Act.

5. Three questions fall for consideration. These are :

1) Is the show cause notice legally bad in so far as the same propose to levy duty in respect of the period covered by exemption Notification issued by the Government u/s 11C ?

2) Is the show cause notice barred by limitation or without jurisdiction in so far as it relates to the extended period beyond six months prescribed by Section 11A ? and;

3) Should this Court interfere with the show cause notice in the face of the self contained machinery provided by the Act for adjudication of the issues raised by the petitioner and if so whether the development of software packages, data processing, etc., referred to in the show cause notice amounts to manufacture of goods within the meaning of Section 3 of the Act ?

6. Reg : Question No. 1 : It is not in dispute that by Notification dated 10th of July, 1991, the Government have exempted the duty payable on computer software in the form of recorded media in exercise of its powers u/s 11C of the Central Excises and Salt Act, for the period 28th of February, 1986, to 27th of April, 1988. This Notification was issued much after the issue of the impugned show cause Notice to the petitioner and would not therefore affect its validity. The effect of the Notification would however be that in so far as the Collector's proposal to subject computer software in the form of recorded media to excise duty for the period covered by the Notification is concerned, the same shall become redundant in the light of the exemption granted by the Government. The validity of the Notice in respect of the rest of the proposal made in the same, would remain unaffected. It follows that while taking further action pursuant to the show-cause notice the Respondents shall have to give effect to exemption Notification and allow the benefit flowing to the petitioner from the same. Question No. 1 is therefore answered accordingly.

7. Reg : Question No. 2 : Section 11 of the Act empowers the Central Excise Officer to initiate proceedings where duty has not been levied or is short levied within six months from the relevant date. This period stands extended to five years in terms of the proviso to the said section in cases where the duty could not be levied or was short levied or was short levied due to fraud, collusion or wilful misstatement or suppression of facts, etc. The proviso reads thus :-

"Provided that where any duty of excise has at been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud, collusion or any wilful 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."

8. It is apparent from a plain reading of the above, that the proviso is in the nature of an exception to the main provision and that in order that the same may be attracted it must be alleged in the show-cause Notice that the duty had not been levied or paid by reason of fraud, collusion wilful misstatement or suppression of fact on the part of the assessee or by reason of contravention of any of the provisions of the Act or and the Rules made thereunder with intent to evade payment of duty by such person or his agent. In other words if the department proposes to invoke the proviso, the show-cause Notice must indicate the omissions or commissions on the basis whereof the benefit of the extended period of limitation is proposed to be taken. I draw support on this view from the decisions of the Supreme Court in *Collector of Central Excise Vs. H.M.M. Limited*, ; *Tamil Nadu Housing Board Vs. Collector of Central Excise, Madras and Another*, and *Pushpam Pharmaceuticals Company Vs. Collector of Central Excise, Bombay*, , reliance whereupon was placed by Mr. Chandrakumar, Counsel for the petitioner.

9. In *Cosmic Dye Chemical Vs. Collector of Central Excise, Bombay*, , the question that arose was whether a misstatement or suppression of facts could even without any intent to evade payment of duty be treated to be sufficient for the authorities to invoke the proviso to Section 11A. Reversing the view taken by the Tribunal, the Supreme Court declared that in so far as the fraud and collusion is concerned, the intent to evade duty was inherent in the said expressions and that a mere misstatement or suppression of facts without the requisite intent to evade payment of duty could not suffice. The misstatement or suppression of facts, must be wilful, just as a contravention of the provisions of the Act or the Rules must be with intent to evade payment of duty. The following passage from the decision states the legal position succinctly.

"Now so far as fraud and collusion are concerned, it is evident that the requisite intent, i.e., intent to evade duty is built into these very words. So far as misstatement or suppression of facts are concerned, they are clearly qualified by the word "wilful" preceding the words "misstatement or suppression of facts" which means with intent to evade duty. The next set of words "contravention of any of the provisions of this Act or Rules" and again qualified by the immediately following words "with intent to evade payment of duty". It is, therefore, not correct to say that there can be a suppression or misstatement of fact, which is not wilful and yet constitutes a permissible ground for the purpose of the proviso to Section 11A. misstatement or suppression of fact must be wilful".

10. Coming then to the present case the show-cause Notice specifically accuses the petitioner of having wilfully suppressed the fact or manufacture of recorded

media falling under tariff item 68 of the earlier Central Excise Tariff and Chapter, Heading 8524.00 of the Central Excise Tariff Act, 1985. The relevant portion of the show cause notice may at this stage be extracted :

"Now therefore, the above said M/s. Kirloskar Computer Services Ltd., Bangalore are alleged to have contravened the provisions of Section 6 of the Central Excises and Salt Act, 1944 read with Rule 9(1), 13, 43, 49, 52A, 53, 173B, 173C, 173G, 173F, 174 and 226 of Central Excise Rules, 1944 inasmuch as they have wilfully suppressed the fact of manufacture of "recorded media" falling under TI 68 of erstwhile Central Excise Tariff and Chapter sub-heading No. 8524.00 of Central Excise Tariff Act, 1985 without obtaining a Central Excise licence and cleared the same clandestinely without accounting the same in the statutory records, without filing a classification list and price list, without raising Central Excise gate passes and without payment of Central Excise duty."

11. A bare reading of the above would show that not only does the show cause notice allege wilful suppression but it also alleges clandestine clearance of goods without accounting the same in the statutory records and filing classification list etc. It is not therefore a case where the show cause notice can be said to be invoking the extended period of limitation without even disclosing the basis on which the same was being done. The show cause notice is sufficiently clear in that it has accused the petitioner of having wilfully suppressed the fact of manufacture of the goods and clandestine clearance of the same. The argument that the show cause notice does not attribute any intention to evade duty to the petitioner does not impress me. The words used in the show-cause notice suggesting wilful suppression of facts and clandestine clearance of the goods are sufficient to convey that the petitioner had the intent to evade the payment of duty. Mechanical or verbatim use of the words "with intent to evade the payment of duty" is unnecessary and may even be a surplusage where the show cause notice otherwise alleges fraud, collusion or wilful suppression. Intent to evade duty is inherent in all such expressions. What is to be seen is whether on a fair reading of the show cause notice, the same conveys that there was an intent to evade even when the said words have not been specifically used. Viewed thus, the show cause notice does sufficient do so and is not therefore exposed to the criticism of falling short of the requirements of the proviso to Section 11A.

12. Mr. Chanderkumar however argued that there could be no intent to evade the payment of duty, for the reason that the Government had itself recognised the practice of not collecting the duty in the exemption Notification issued u/s 11C as also for the reason that the Government had declared its policy to continue the said exemption. Whether or not there was any intention to evade the payment of duty is primarily a question of fact to be determined on the basis of the attendant circumstances. The exemption Notification issued and the policy statements made by the Government may have some relevance for the purposes of determining whether there could at all be any intention to evade, but then that is an area in which the competent Authority shall have to take a view having

regard to the attendant circumstances. It is neither proper nor necessary for this Court to clutch at the jurisdiction of the competent authority to determine the said question thereby short circuiting the process of determination prescribed under the Act. It shall be indeed open for the petitioner to canvass before the competent Authority on the basis of the Notification and other documents relied upon by it, that there was or could be no intent to evade the duty. The validity of the show cause notice cannot however be questioned simply on the ground that according to the petitioners perception there could or was no intent to evade the payment of duty. Question No. 2 is therefore answered accordingly.

13. Reg. Question No. 3 : Interference with the proceedings initiated by the Statutory Authority in exercise of the extraordinary writ jurisdiction would be justified only in exceptional circumstances. Three situations in which Courts have interfered even when the statutes under which the proceedings are initiated provide for a complete machinery to challenge the orders passed are :

(i) Cases where the Constitutional vires of the very enactment under which the proceedings are initiated is under challenge;

(ii) Cases where the proceedings have been initiated or concluded in total violation of the principles of natural justice; and

(iii) Where the orders impugned are totally without jurisdiction or where private and public wrongs are so inextricably mixed up or where prevention of public injury and the vindication of public justice demands that recourse to Article 226 of the Constitution be taken. In cases where public Revenue are involved and the Statutes under which such revenue are being collected provide for a complete code and a comprehensive machinery for correction of the orders that the Authorities may make, interference either at the initial or at the intermediate stage is not viewed by Courts with affection.

14. In *Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others*, the proceedings under challenge were initiated under the Orissa Sales Tax Act. The Court held that the Act provided a complete machinery for the assessee to challenge the orders of assessment in the manner and before the authorities prescribed thereunder. Recourse to Article 226 of the Constitution of India in cases where a right or a liability is created by a statute which also provides for a remedy for enforcement or determination of the same, was to be avoided. The following passage is in this regard apt.

"We are dealing with a case in which the entrustment of power to assess is not in dispute, and the authority within the limits of his power is a Tribunal of exclusive jurisdiction. The challenge is only to the regularity of the proceedings before the learned Sales Tax Officer as also his authority to treat the gross turnover returned by the petitioners to be the taxable turnover. Investment of authority to tax involves authority to tax transactions which in exercise of his authority the Taxing Officer regards as taxable, and not merely authority to tax only those transactions which are, on a true view of the facts and the law, taxable.

The Act provides for a complete machinery to challenge an order of assessment, and the impugned orders of assessment can only be challenged by the mode prescribed by the Act and not by a petition under Article 226 of the Constitution. It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of."

15. The above view was reiterated of their Lordships in Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others, in the following words :

"In Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others, A. P. Sen. E. S. Venkataramiah and R. B. Mishra JJ., held that where the statute itself provided the petitioners with an efficacious alternative remedy by way of an appeal to the Prescribed Authority, a second appeal to the Tribunal and thereafter to have the case stated to the High Court, it was not for the High Court to exercise its extraordinary jurisdiction under Article 226 of the Constitution ignoring as it were, the complete statutory machinery. That it has become necessary, even now, for us to repeat this admonition is indeed a matter of tragic concern to us. Article 226 is not meant to short circuit or circumvent statutory procedures. It is only where statutory remedies are entirely ill suited to meet the demands of extraordinary situations, as for instance where the very vires of the statute is in question or where private or public wrongs are so inextricably mixed up and the prevention of public injury and the vindication of public justice require it that recourse may be had to Article 226 of the Constitution. But then the Court must have good and sufficient reason to by-pass the alternative remedy provided by statute. Surely matters involving the revenue where statutory remedies are available are not such matters. We can also take judicial notice of the fact that the vast majority of the petitions under Article 226 of the Constitution are filed solely for the purpose of obtaining interim orders and thereafter prolong the proceedings by one device or the other. The practice certainly needs to be strongly discouraged."

16. To the same effect are two Divisions Bench decisions of this Court in W.A. Nos. 2031 and 2032/1989 D.D. on 3.6.1991; and W.A. No. 15488, 1985 D.D. on 11.8.1992 where this Court while considering the question of classification of goods under the Excise Act, declared that such matters have to be dealt with by the Authorities under the provisions of the Act, which provide a comprehensive machinery for the same including an appeal before the Central Excise and Gold (Control) Appellate Tribunal and one even to the Supreme Court u/s 35L. It was declared that this Court could not assume the role of an adjudicating authority especially when the correctness of the orders that such authorities may pass under the Act could be examined in appeal by the Appellate Authorities prescribed.

17. In the present case, the only area in which the petitioner could possibly succeed related to the validity of the show cause notice on account of the same

being beyond the period of limitation or that the proposed action was contrary to any other. Notification issued by the Government. In the light of the view that I have taken in regard to the said two aspects, the show cause notice cannot be declared to be without jurisdiction so that any exercise started on the basis thereof may be considered to be no more than an abuse of the process of law or an avoidable harassment to the petitioner. As to whether software development activities undertaken by the petitioner on a commercial scale can be deemed to be manufacture of goods, is a matter that does not affect the jurisdiction of the authority to initiate appropriate assessment proceedings and pass an order. Indeed the entrustment of the power to assessee is not in dispute. It is the result of the exercise of that power which has come under challenge. The test for determining whether the order is competent, is not whether the same is as accurate as ought to be, but whether the power which the authority has involved to pass the order is truly available to it under the statute. If the answer be in the affirmative it would matter little whether the conclusion drawn by the authority was wholly correct, partially correct and particularly incorrect or wholly incorrect, if the Collector eventually comes to a conclusion adverse to the petitioner, the same can be assailed in appeal before the prescribed appellate authority, but just because the Collector may pass an order which may not be to the liking of the petitioner, or may not eventually stand the test of scrutiny by a higher authority or Court would not affect the jurisdiction of the Authority to pass an order. In other words the jurisdiction to pass an order is different from a duty to pass a correct order. If there is no inherent lack of jurisdiction then just because the order that the Authority has passed or may propose to pass is not or may not be a correct order is no reason why the authority should be prevented from exercising its jurisdiction. Similarly if the Authority lacks inherent jurisdiction to pass an order, then even if the conclusion arrived at by it on merits may be legally unexceptionable, the order shall have to be set aside. Law not only require that correct orders should be passed by it also requires that the same must be passed by the Authorities competent to do so. The remedy against an incorrect order passed by an Authority competent to do so is not a short cut to the High Court but recourse to the statutory remedies prescribed by the Act. In that view therefore I see no reason to short circuit the proceedings initiated by the Collector, the valiant attempt made by Mr. Chandrakumar, for persuading me to do so notwithstanding. Whether or not recording of sound on duty paid magnetic tapes and development of computer software and recorded media are comparable as argued by Mr. Chandrakumar shall have to be examined by the competent Authority having regard to the processes that are involved and the nature of the ultimate product that is marketed by the petitioner. In the fast developing Hi-Tech Computer world, the complexities of the processes involved in preparation of recorded media and other activities aimed at developing software programmes would require a certain degree of technical knowledge if not proficiency in skills sufficient for authoritatively answering the question raised by the petitioner one way or the other. Recording of sound on a magnetic tape as was the position in Prabhat Studio's case is only one end of the spectrum,

development of software computer programmes, and recorded media marketed on commercial scales being the other. Whether one is synonymous to the other remains to be examined and in my opinion this Court would do well to leave it to be determined by the Authorities under the Act instead of interposing at this stage of the proceedings. Question No. 3 is therefore answered accordingly.

18. In the result this writ petition fails and is accordingly dismissed, reserving liberty for the petitioner to file an appropriate reply to the show cause notice within four weeks from today. Since the matter has remained pending for considerable length of time, the Respondents shall expedite the disposal of the same and pass appropriate orders in accordance with law and keeping in view the observations made in this judgment as far as possible within a period of six months from today.

19. No costs.