
(2001) 12 AHC CK 0010

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No's. 204-206 of 2001

Laxmi Rolling Mills

APPELLANT

Vs

C.E.G.A.T., New Delhi

RESPONDENT

Date of Decision : 19-12-2001

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35K
Constitution of India, 1950 — Article 226

Citation : (2002) 80 ECC 84 : (2002) 142 ELT 327

Hon'ble Judges : P.K. Jain, J

Bench : Single Bench

Advocate : A.P. Mathur, for the Appellant; Subodh Kumar and G.R. Gupta, C.G.S.C., for the Respondent

Final Decision : Allowed

Judgement

P.K. Jain, J.—These three writ petitions arise out of the order, dated 30-12-97 passed by respondent No.2 Commissioner of Central Excise, Kanpur-II and affirmed by respondent No. 1 in appeal by order, dated 29-8-2000. Common questions of fact and law are involved in all the three writ petitions. Hence, the same are being disposed of ,by a common judgment.

2. Brief facts giving, rise to the present writ petitions are that the petitioners are engaged in manufacture of bars and rods of mild steel from rol-lable and re-rollable old and discarded rails wheels, fishplates etc. purchased from railway auctions without melting the same. The petitioners are duly registered with the Central Excise Department. The petitioners were availing the benefit of Notification No. 202/1988-CE., dated 20-5-88 as amended by Notification No. 33 of 1992-C.E., dated 1-3-1992 in respect of clearance of their final products. The claim of the petitioners is that in terms of the said notification MS. round bars were eligible for clearance at nil rate of duty if the same were manufactured out of rollable/re-rollable materials which are clearly recognizable as duty paid. The petitioners were served with a notice of demand-cum-show cause as contained in

Annexure-2 to each writ petitions on the ground that the petitioners have cleared their end-products at nil rate during the period of August, 1992 to February, 1994 by availing the benefit of notification as aforesaid though the said notification was not applicable in their case. The petitioners were required to show cause to the Commissioner Central Excise, respondent No.2 as to why the amount as mentioned in the show cause be not recovered from them towards duty and as to why they may not be penalized for contravening the various provisions of the Central Excise Act and Rules framed thereunder. The petitioners filed show cause reiterating that they were entitled to the benefit of Notification No. 202 of 1988-C.E., dated 20-5-88 as amended by subsequent Notification No. 33 of 1992-C.E., dated 1-3-92 as they were using unserviceable rails, fishplates etc. classifiable under Chapter 73 of the Central Excise Tariff Act, 1985 purchased in auction directly from the railways and consequently the duty paid nature of the said goods cannot be doubled. It was the case of the petitioners that the railway had paid excise duty at the time of purchase of the goods and after use of the same were auctioned in the same conditions as unserviceable goods. Any item which is duty paid does not become non-duty paid by mere prolonged use of the same. Respondent No.2 passed adjudication order as contained in Annexure-4 to each writ petitions holding that the petitioners did not correctly declare the nature and character of the inputs and they suppressed the facts and illegally claimed the benefit of exemption under the Notification. It was also held by respondent No.2 that the extended period of limitation could be invoked in the cases as the facts were suppressed and illegal claim of benefit of exemption under the Notification was made. Feeling aggrieved by the said order the petitioners filed separate appeals before respondent No. 1. The appeals were finally decided by respondent No. 1 vide order, dated 29-8-2000 issued on 3-10-2000 and served upon the petitioner on 10-11-2000. The order, dated 30-12-97 passed by respondent No.2 and the order, dated 29-8-2000 as affirmed by respondent No. 1 are sought to be quashed by issuing a writ of certiorari. Further prayer made is to issue a writ of mandamus directing the respondents to give benefit of the aforesaid notification.

3. Sufficient opportunity was afforded to the respondents to file counter affidavit but the same was not filed, Shri A.P. Mathur, learned Counsel for the petitioners had urged that counter affidavit in the present petitions was not needed as the Court was required to only interpret the Notification as aforesaid and only the question involved in the writ petitions is whether the railway has cleared the goods without payment of duty and the benefit of the Notification is not available to the petitioners. Agreeing with Sri A.P. Mathur the Court proceeded to hear the writ petitions.

4. Shri A.P. Mathur, learned Counsel for the petitioners in all the three writ petitions and Shri Subodh Kumar, learned Standing Counsel appearing for the respondents in Writ Petition nos. 205 and 206 of 2001 and Shri G.R. Gupta, learned Standing Counsel appearing for the respondents in Writ Petition No.204 of 2001 have been heard.

5. A preliminary objection raised on behalf of the respondents is that since the goods were purchased by the petitioners during auction sale at Barabanki which falls within the jurisdiction of Lucknow Bench of Allahabad High Court, the Principal Bench at Allahabad has no jurisdiction to hear and decide the writ petitions. Shri Mathur, on the other hand, has submitted that since the cause of action for the petitioners arose with the passing of the order by respondent No.2 at Kanpur which is within the jurisdiction of Allahabad High Court (the Principal Bench at Allahabad), this Court has jurisdiction to hear and decide the writ petitions. There is no dispute as to the fact that the discarded rails etc. which have been used as inputs by the petitioners in manufacture of their end-products were auctioned at Barabanki which falls within the jurisdiction of the Lucknow Bench of the Allahabad High Court but the cause of action certainly arose by passing of the order by respondent No.2 at Kanpur which was affirmed by respondent No. 1 and the same are sought to be quashed. The demand raised by the Department was in pursuance of the orders passed by respondent No.2 at Kanpur. Therefore, in my view, the cause of action arose at Kanpur when the impugned orders were passed by respondent No.2 and demands were raised holding that the petitioners were not entitled to the benefit of the aforesaid Notification. The view taken by me is supported by a decision of the Division Bench of this Court in Sahara India Limited and others v. Commissioner of Income Tax, Kanpur and others 1999 U.P.T.C.-1262 That was a case in which the assessing officer in exercise of the powers u/s 142(2A) of the Income Tax Act passed an order directing the assessee to get the accounts audited by nominated accountant at Lucknow. Before serving the order the same was sent to respondent No. 1 for approval who was sitting at Kanpur. Writ petitions were filed challenging the order passed by the assessing authority to get the account audited. The High Court held that the order directing the assessee to get the account audited by the nominated accountant was passed at Lucknow by respondent No.2 and the alleged resultant injury to the petitioner was caused at Lucknow. Thus, there is no escape from conclusion that the cause of action to maintain the writ petitions arose on 24th January, 1997 at Lucknow when and where the respondent No.2 passed the impugned order. The grant of "previous approval" by the respondent No. 1, Chief Commissioner or the Commissioner will be no occasion for the assessee to be aggrieved. Unless the assessing officer directs the assessee to get the accounts audited the assessee will have no cause of distress or injury. In the absence of direction for getting the accounts audited by the nominated accountant, neither mere formation of requisite opinion by the assessing officer nor grant of approval by the Chief Commissioner or Commissioner can cause any pain or injury calling for redress. Therefore, in reference to the context, it is the act of the assessing officer directing audit by the defined accountant and the resultant injury, which will furnish cause of action to the assessee. The cause of action will arise whenever and wherever the order giving direction to the assessee is passed by the assessing officer.

6. In the instant case, there is no doubt and there can be no dispute that the

petitioners purchased the goods at auction, which was held at Bara-banki. The order as contained in Annexure-2 was passed by respondent No.2 at Kanpur and therefore, the cause of action would arise for the petitioners at Kanpur, which is within the jurisdiction of the Principal Bench at Allahabad (Allahabad High Court). Therefore, the preliminary objection raised on behalf of the respondents is not sustainable.

7. Now comes to the question whether the petitioners were entitled to the benefit of the Notification No. 202 of 1988-C.E., dated 20-5-88 as amended by Notification No. 33 of 1992-C.E., dated 1-3-92. It is undisputed that the aforesaid Notification exempts goods of the description specified in column no. 3 of the table annexed, which was referred to as final products and which fell within the Chapters 72 and 73 or Heading No. 84.54 of the Schedule of Central Excise Tariff Act, 1985. The question is whether the petitioners were entitled to the benefit of this Notification. The submission of Shri A.P. Mathur, learned Counsel for the petitioners is that there is nothing on record or in the orders passed by the authorities below nor it is the case of the Department that the railway is manufacturer, producer, curer of any excisable goods or stores such goods in warehouse. His submission is that u/s 3 of the Central Excise Act the excise duty is levied and collected on all excisable goods which are produced and manufactured in India and under Rule 7 every person who produces, cures or manufactures excisable goods or who stores such goods is liable to pay excise duty. He further points out that Rule 9 further provides that no excisable goods shall be removed from any place where they are produced, cured or manufactured without payment of excise duty which is leviable on them. His submission is that the railway who auctioned the goods not being covered by the aforesaid rules cannot be deemed to have cleared the goods without payment of excise duty. It is submitted that the railway purchases rails wheels, fishplates etc. from other manufacturers who pay excise duty before clearance of such goods. Therefore, the goods are clearly covered by the Notification in question. It is next submitted that both respondent nos. 1 and 2 have misconstrued the provision of law by holding that at the time of selling or auctioning the goods in question the duty paid character of the railway scrap was not established and the benefit of the Notification was not available to the petitioners. His submission is that onus was on the Department to prove that the goods have not suffered duty before they were purchased by the railway and were used by the railway. Learned Standing Counsel appearing for the respondents has, however, submitted that to avail themselves of the benefit of the Notification it was for the petitioners to have established the duty paid character of the railway scrap.

8. To appreciate the arguments of the learned Counsel for the parties it would be appropriate to quote certain provisions of law.

Sections 3(1) and 3(1A) of the Central Excise Act read as follows:

"3. Duties specified in the Schedule to the Central Excise Tariff Act, 1985 to be levied. - (1) There shall be levied and collected in such manner as may be

prescribed duties of excise on all excisable goods which are produced or manufactured in India as, and at the rates, set forth in the Schedule to the Central Excise Tariff Act, 1985:

Provided that the duties of excise which shall be levied and collected on any excisable goods which are produced or manufactured -(i) in a free trade zone and brought to any other place in India; or

(ii) " by a hundred per cent export-oriented undertaking and allowed to be sold in India, shall be an amount equal to the aggregate of the duties of customs which would be leviable u/s 12 of the Customs Act, 1962 (52 of 1962), on like goods produced or manufactured outside India if imported into India, and where the said duties of customs are chargeable by reference to their value; the value of such excisable goods shall, notwithstanding anything contained in any other provisions of this Act, be determined in accordance with the provisions of the Customs Act, 1962 (52 of 1962) and the Customs Tariff Act, 1975 (51 of 1975).

Explanation-1 x x x x x

Explanation 2 x x x x x

(1A) The provisions of Sub-section (1) shall apply in respect of all excisable goods other than salt which are produced or manufactured in India by, or on behalf of, Government, as they apply in respect of goods which are not produced or manufactured by Government."

Rules 7 and 9 of the Central Excise Rules read as follows:

"Rule-7. Recovery of Duty. - Every person who produces, cures or manufactures any excisable goods, or who stores such goods in a warehouse, shall pay the duty or duties leviable on such goods, at such time and place and to such person as may be designated, in, or under the authority of these rules, whether the payment of such duty or duties is secured by bond or otherwise:

Provided that nothing contained in this rule shall apply to molasses produced in a Khandsari sugar factory."

"Rule 9. Time and manner of payment of duty. - (1) No excisable goods shall be removed from any place where they are produced, cured or manufactured or any premises appurtenant thereto, which may be specified by the Commissioner in this behalf, whether for consumption, export or manufacture of any other commodity in or outside such place, until the excise duty leviable thereon has been paid at such place and in such manner as is prescribed in these Rules or as the Commissioner may require and except on presentation of an application in the proper form and on obtaining the permission of the proper officer on the form:

Provided x x x x x

Provided x x x x x

Provided x x x x x

Provided x x x x x

(1A) x x x x x

(2) x x x x x

Explanation - x x x. x x".

9. A combined reading of the aforesaid Sections 3, 3(1) and 3(1A) of the Central Excise Act and Rules 7 and 9 of the Central Excise Rules clearly indicates that excise duty is leviable and recoverable only at the point of clearance by producer, manufacturer or curer of any excisable goods or by the person who stores such goods in a warehouse. It is not the case of the Department nor there is any finding to this effect by the authorities below that the railway, who auctioned the discarded rails etc. to the petitioners, was manufacturer, producer and curer of the goods auctioned by it. Even if for the argument sake it is assumed that the goods were manufactured by railway the same could not have been cleared for consumption by themselves without payment of excise duty as is evident from reading of Rule 9. In the circumstances and in view of the aforesaid provisions of law there was no occasion for the authorities below to presume that the goods were non-duty paid. They shall have to be deemed duty paid at the time when the same were used by the railway or when the same were auctioned. No duty is leviable at the time of sale of excisable goods after the same have been used by the party concerned. Entry No. 73.02 of Chapter 73 of the Central Excise Tariff Act, 1985 reads as follows :

"Railway or tramway track construction material of iron or steel, the following: Rails, check-rails and rack rails, switch blades, crossing frees, point rods and other crossing pieces, sleepers (cross-ties), fishplates, chairs, chair wedges, sole plates (base plates), rail clips, bedplates, ties and other material specialized for jointing or fixing rails."

10. The aforementioned materials are used in construction of railway track, which are excisable goods and cannot be cleared without payment of excise duty. Therefore, the duty paid nature of the railway auction by the railway shall have to be presumed in terms of the Explanation to the Notification aforesaid, which reads as follows :

"Explanation - For the purposes of this notification all stocks of inputs in the country except such stocks as are clearly recognizable as being non-duty paid, shall be deemed to be inputs on which the duty has already been paid."

11. From perusal of the explanation to the aforesaid notification it is" clear that the burden of establishing that the inputs were non-duty paid and the petitioners were, therefore, not entitled to the benefit of the notification as aforesaid shall be on the Department failing which their duty paid character shall be presumed or deemed to be inputs on which the duty has already been paid. Thus, there is

substance in the submission of Sri A.P. Mathur that the onus was on the Department to prove that the goods have not suffered duty or that the same are recognizable being non-duty paid. Mere auctioning by the railway the discarded rails etc. would not automatically lead to the inference that the same were clearly recognizable as deemed non-duty paid-The authorities misdirected themselves in holding that since the railway was not registered with the Central Excise Department, the sale by it through auction cannot lead to the inference that the goods auctioned were duty paid. The benefit of Notification was wrongly denied to the petitioners.

12. In view of the foregoing discussions the petitions deserve to be allowed and the impugned orders passed by respondent nos. 1 and 2 deserve to be quashed and the petitioners are entitled to the benefit of Notification No.202 of 1988-C.E., dated 20-5-88 as amended by subsequent Notification No. 33 of 1992-C.E., dated 1-3-92. The petitions are, therefore, allowed. The impugned orders passed by respondent No.2 as affirmed by respondent No. 1 are hereby quashed and it is declared that the petitioners are entitled to the benefit of Notification No. 202 of 1988-C.E., dated 20-5-88 as amended by subsequent Notification No. 33 of 1992-C.E., dated 1-3-1992.