

(1991) 01 GUJ CK 0003
In the Gujarat High Court

Case No : Special Civil Application No. 1369 of 1979

McGaw - Ravindra Laboratories (India) Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 23-01-1991

Acts Referred:

Central Excise Rules, 1944 — Rule 10, 9, 9(1)

Citation : (1991) 33 ECC 257 : (1991) ECR 523 : (1992) 60 ELT 71 : (1992) 2 GLR 967

Hon'ble Judges : J.M. Panchal, J;G.T. Nanavati, J

Bench : Division Bench

Advocate : J.M. Thakore, General and S.I. Nanavati, for the Appellant; B.B. Naik, A.S.C., for the Respondent

Judgement

G.T. Nanavati, J.—The petitioner is engaged in manufacturing plastic administration sets, blood administration sets, blood donor sets, tubes and catheters. For manufacturing tubes and catheters, the petitioner is using PVC resins, polyadditive and polyamide materials. In the manufacture of administration sets and blood donor sets, the petitioner not only uses plastic tubes and catheters manufactured by it but also metal needle, aluminium clamps and small pieces of latex rubber tubes which are purchased by the petitioner from other manufacturers. As the goods manufactured by the petitioner fall within Tariff Item No. 15A(1) of the First Schedule to the Central Excises & Salt Act, 1944, and as there was an exemption from payment of whole of the excise duty, because of Exemption Notification No. 68 of 1971 dated 29-5-1971, the petitioner had not taken out any licence for manufacture of those articles and they were removing the said articles without payment of any duty.

2. The Superintendent of Central Excise visited the petitioner's factory on 30th March 1973 and after ascertaining which articles were manufactured by the petitioner, wrote a letter to the petitioner on 30-6-1973 drawing their attention to the requirement of taking out a central excise licence for manufacturing those

articles. On July 4, 1973, the petitioner wrote to the Superintendent that they were manufacturing solution administration sets, blood administration sets, blood donor sets, tubes and catheters and the basic raw materials used are PVC resin for tubes, catheters and sets. It also assured the Superintendent that it would apply for a licence in form L-4 immediately. The petitioner then applied for the licence and it was accordingly granted on 20-7-1973 for manufacturing solution administration sets, blood administration sets, tubes, catheters and blood donor sets of plastic. Thereafter the said licence has been renewed from year to year till 1977. The petitioner then applied for renewal of the licence for the years 1977 to 1979 on November 9, 1976. But it appears that it was not renewed as by that time the Superintendent entertained a doubt as to whether the plastic sets manufactured by the petitioner were properly classifiable under Tariff Item No. 15A or Tariff Item No. 68 which was introduced in the Schedule on 1st March, 1975. The Superintendent had expressed his opinion that the plastic sets manufactured by the petitioner may fall under Tariff Item 68 on 11-7-1977 when he had visited the petitioner's factory. Subsequently, by his letter dated 5-9-1977, the Superintendent informed the petitioner in clear terms that the plastic sets manufactured by the petitioner are really chargeable to excise duty under Tariff Item No. 68 with effect from 1-3-1975. He called upon the petitioner to file a classification list of the said articles under Tariff Item No. 68 for his approval by his letter dated 29-11-1977. He also called upon the petitioner to furnish details regarding production and clearance of all types of plastic sets manufactured by the petitioner commencing from 1-3-1975 till that date. The petitioner denied that the plastic sets manufactured by it fell under Tariff Item 68 and maintained that they were really covered by Tariff Item No. 15A. Ultimately on October 10, 1978 the Assistant Collector of Central Excise gave a notice to the petitioner calling upon it to show cause why the plastic sets described at Sr. Nos. 1 to 12 in the list attached to the classification list submitted by the petitioner should not be classified as articles other than plastic articles and not elsewhere specified and thus falling under Tariff Item No. 68 and why duty at the appropriate rates should not be levied on such articles under Tariff Item No. 68 and Rule 9 of the Central Excise Rules, 1944. The petitioner, by its reply, contended that Rule 9(1) could not be evoked in this case as the goods were removed with the consent and knowledge of the Excise Officers. In spite of this reply, the respondent wanted to proceed further with the inquiry and, therefore, the petitioner has filed this petition challenging the said show cause notice. The petitioner also wants this Court to restrain the respondent from taking any proceeding against the petitioner for recovering the excise duty on the said articles manufactured by the petitioner on the ground that they fall under Tariff Item No. 68 and are not covered by Tariff Item No. 15A(2) and exempted by Notification No. 68/71 dated May 29, 1971.

3. Though in the petition, the said show cause notice is challenged also on the ground that in absence of any change in the pattern of manufacture from 1973 till the date of the notice, the Assistant Collector had no basis whatsoever for

changing his opinion and, therefore, could not have lawfully issued the show cause notice, that contention has been given up at the time of hearing of this petition. So also the learned Advocate General did not press the contention raised in the petition that because of the doctrine of promissory estoppel it should be held that the respondent cannot be permitted to change the classification of the said articles from Tariff Item No. 15A to Tariff Item No 68. Only two contentions were pressed and they are : (1) The articles manufactured by the petitioner are articles made from plastic and as there is a specific entry being Tariff Item No. 15A covering such articles, they cannot justifiably be classified as "goods not elsewhere specified" and thus falling under Tariff Item No. 68 of the First Schedule to the Act and (2) Even if they are properly classifiable under Tariff Item No. 68, the respondent cannot recover excise duty on the goods manufactured and removed prior to April 10, 1978 as the petitioner cannot be said to have evaded payment of duty by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or by contravening any of the provisions of the Rules with intent to evade payment of duty.

4. There is no dispute between the parties that the tubes and catheters which the petitioner is manufacturing are manufactured from plastic materials. It is also not in dispute that the tubes and other articles mentioned at Sr. Nos. 13 to 28 in the classification list submitted by the petitioner on 14-3-1978 are properly classified as falling under Tariff Item No. 15A(2). The dispute is only with respect to Items at Sr. Nos. 1 to 12, which are described in the classification list as plastic sets. Till 1-3-1975 the petitioner and the department both proceeded on the footing that they were classifiable under Tariff Item No. 15A but they were exempted from payment of duty in view of Notification No. 68/71 dated May 29, 1971. However, the First Schedule was amended in 1975 and Tariff Item No. 68 which is residuary in nature came to be added in the Schedule. That Entry is with respect to all other goods not elsewhere specified in the Schedule. It was after the introduction of this Entry that a doubt came to be entertained by the department regarding proper classification of plastic sets produced by the petitioner. The Superintendent had even taken samples of the articles on 15th March, 1975 and other information was called for from the petitioner from time to time in order to determine whether said articles were properly classifiable as falling under Tariff Item No. 15A or Tariff Item No. 68. The department had also called upon the petitioner to supply information regarding method of process and raw-materials used by the petitioner in manufacturing the plastic sets. Again, samples of such sets were obtained by the department in July, 1977. Thus, on examination of the relevant material and the samples, the department was of the view that the plastic administration sets manufactured by the petitioner cannot properly be included in Tariff Item No. 15A and, therefore, they were really classifiable as falling under Tariff Item No. 68.

5. What is contended by the learned Advocate General is that right upto January 1977 the department had treated the goods as falling under Tariff Item No. 15A. The petitioner was called upon to take out the manufacturing licence on the

ground that the items manufactured by it were excisable goods falling under Tariff Item No. 15A. The department having thus classified the plastic administration sets as falling under a specific Entry cannot now turn round and say that they are properly classifiable under Tariff Item No. 68 merely because such a residuary Entry has now been inserted in the Schedule. It was submitted by him that if the goods in question can be brought under any of the specific Items mentioned in the Tariff, resort cannot be had to a residuary Item. He submitted that according to the department's own understanding and interpretation of Tariff Item No. 15A, the plastic sets manufactured by the petitioner were treated all along as covered by Tariff Item No. 15A till 1977 i.e. even after the introduction of Tariff Item No. 68 on 1-3-1975. He submitted that the tubes manufactured by the petitioner are nothing else but articles of plastic. When administration set is manufactured, what is done is adding catheter at one end and a needle at the other end of the tube. Aluminium clamp which is fixed on the tube is only for an incidental purpose. Thus it remains an article of plastic even after addition of the catheter, the needle and the clamp.

6. In support of his contention, the learned Advocate General relied upon the following observation in the decision of this court in *Bhor Industries Limited v. Union of India* 1980 (6) E.L.T. 752 :

"5. In a way, Mr. Andhyarujina who appears on behalf of the petitioners is justified in commenting that unless the earlier order made by the Appellate Collector in the case of the petitioners themselves in respect of the same excisable goods was got rid of, the central excise authorities in fairness could not have issued the fresh show cause notice. Indeed, he has told us that no principle of *res judicata* operate in case of such decision but that justice and fair play require that as long as a quasi-judicial decision stands, what has been decided therein cannot be reopened by issuing a fresh show cause notice."

Relying upon this observation, it was submitted that if the department is allowed to change its mind from time to time in respect of the same articles, that would lead to utter confusion and uncertainty. The learned Advocate General placed strong reliance upon the judgment of the Supreme Court in *Indian Metals & Ferro Alloys Ltd. v. Collector of Central Excise* 1991 (51) E.L.T. 165, and submitted that as per the department's own interpretation of Entry 15A(2) that plastic administration sets manufactured by the petitioner are covered by specific Entry 15A(2), it cannot be now permitted to change its mind merely because Tariff Item No. 68 is now introduced. In our opinion, the decision of this Court in *Bhor Industries Ltd.* (supra) has really no application to the facts of this case. In this case no classification list was ever submitted or approved prior to 1978 and thus in that sense there was no decision or order given by the competent officer as regards the correct classification of the articles. It is no doubt true that all along the petitioner and the department proceeded on the footing that the articles manufactured by the petitioner were falling under Tariff Item No. 15A(2) but merely from that conduct the department cannot be estopped from now

contending that the goods are rightly classifiable under a different Entry. Understanding or the conduct of the department, even for a long period, cannot amount to estoppel against operation of a statute. Therefore, it cannot be said that on this ground issuance of the impugned notice by the department is either unfair or bad in law.

7. In the case of Indian Metals & Ferro Alloys Ltd. (supra), the Supreme Court, on merits, came to the conclusion that the transmission and lighting poles manufactured by the said company were correctly classifiable as falling under Item 26AA and, therefore, were rightly classified as such on earlier occasions when classification lists were submitted for approval by the department. After coming to that conclusion, the Supreme Court further held that since the poles manufactured by the said company were rightly classified under Tariff Item 26AA, the question of revising the classification cannot arise merely because Item 68 was introduced to bring into the tax net items not covered by the various items set out in the Schedule. It is further held that it does not and cannot affect the interpretation of the items enumerated in the Schedule. Ultimately, what is held by the Supreme Court in that case is that if an article is rightly classified as falling under a specific tariff item, then the said classification cannot be revised so as to include the said article under Item 68. As pointed out above, in this case, no classification list was submitted earlier by the petitioner and, therefore, strictly speaking the classification made by the petitioner was not approved at any stage by the department though that was also the understanding of the department till 1975.

8. After 1975 they entertained a doubt whether it was a correct classification of the articles and therefore, they had not only taken samples for examination but had also called for information from time to time from the petitioner as regards the method of process and the materials used for the purpose of manufacturing those articles. After examining the said materials and the samples, it was brought to the notice of the petitioner that the articles manufactured by it might properly fall under Tariff Item No. 68. Ultimately by November, 1978 they came to the conclusion that the articles could not properly be classified under Tariff Item No. 15A(2) but only under Tariff Item No. 68. Since, in that sense, the classification was being changed, the department issued a show cause notice to the petitioner calling upon it to show cause why the articles at Sr. Nos. 1 to 12 should not be classified as falling under Tariff Item No. 68. Thus the stand taken by the department in this case is that though they had understood earlier that the articles manufactured by the petitioner were falling under Tariff Item No. 15A(2), it was a mistake and they can rightly be classifiable only under Tariff Item 68. It was rightly pointed out by Mr. Naik, learned Advocate appearing for the respondent, that so far as the tubes manufactured by the petitioner are concerned, they can rightly be said to be articles of plastic falling under Tariff Item No. 15A(2) since they are nothing else but plastic in different shape and form. But as regards the administration sets produced by the petitioner, it cannot be said that they are articles of plastic. They are composite articles not wholly

made of plastic material. As we have pointed out earlier, such sets consist of plastic tubes manufactured by the petitioner, fitted with catheter at one end and metal needle at the other end. Aluminium clamp is affixed to it with a view to regulate the flow of liquid passing through it. In the market they are not known as plastic tubes but as administration sets. It is a specialised use and thus has a distinct name and use. It is, therefore, a different item. In our opinion, these articles can rightly be classified under Tariff Item No. 68. They may be described as articles made from plastic material but they are not articles of plastic as contemplated by Tariff Item No. 15A.

9. As held by the Supreme Court in *Indian Metals and Ferro Alloys Ltd., Cuttack Vs. The Collector of Central Excise, Bhubaneshwar*, "articles made of plastic" means article made wholly of commodity commercially known as plastic and not articles made from plastics along with other material. The Supreme Court in that case has further pointed out that Tariff Item No. 15A(2) would include articles such as tubes, rods, sheets etc. of plastic materials which are really plastic materials in different shape and form. Applying the *noscitur a sociis* principle of interpretation, the Supreme Court in that case held that "articles made of plastic" means articles made wholly of commodity commercially known as plastics and not articles made from plastics along with other material. While interpreting an item in a taxing statute, the meaning which is generally given to it by a person in the trade or in the market has to be given to that term. The said observation does support our conclusion that the articles in question cannot be described as articles of plastic and, therefore, they can rightly be classified under Tariff Item No. 68. The first contention raised on behalf of the petitioner therefore will have to be rejected.

10. The second contention is that in view of the facts and circumstances of the case, it is not open to the department to recover excise duty on the basis that the goods are rightly classifiable under Tariff Item No. 68 for the period prior to six months from the date of the notice. The learned Advocate General drew our attention to the correspondence which is on the record of this petition and submitted that right from 1973 the petitioner had informed the department that it was manufacturing plastic specialities like administration sets alongwith tubes and catheters. The petitioner's factory was visited by the officers of the Excise Department from time to time. On one such visit on 30-3-1973 an officer of the Department had drawn the attention of the petitioner to the requirement of taking out a licence. The petitioner had, therefore, applied for licence even though by its letter dated July 4, 1973, it had pointed out that the goods manufactured by it were not liable to payment of excise duty and, therefore, it was not necessary for them to apply for such a licence. By that letter, the petitioner had also pointed out to the department that it was manufacturing solution administration sets generally used for administration of intravenous solution, blood administration sets for administration of blood, blood donor sets for collection of blood and tubes and catheters, out of PVC resin by using the processes of extrusion, moulding and assembly of various parts. The petitioner

had then applied for licence on 2-11-1974 for manufacturing PVC resin administration sets and tubes and licence for manufacturing such articles was granted by the department. The petitioner had not paid the duty for the goods manufactured and removed by it because according to it, it was entitled to the benefit of exemption Notification No. 68/71 dated May 29, 1971 and this position was accepted by the department. After insertion of Tariff Item No. 68 in the First Schedule to the Act from 1-3-1975, the Superintendent of Central Excise had visited the factory of the petitioner and taken samples of administration sets manufactured by it. Whatever information he wanted was supplied to him from time to time. Even by their letter dated 27-1-1977, the department had written to the petitioner that the administration sets and tubes manufactured by the petitioner were falling under Tariff Item No. 15A and, therefore, classification list to that effect should be filed by the petitioner. The petitioner was also called upon to disclose the method of process and the raw materials used by the petitioner in manufacturing those sets. He, therefore, submitted that this is not a case where it can be said that the petitioner had evaded payment of duty by reason of fraud, collusion or any wilful misstatement or suppression of facts or that it had done so by contravening any of the provisions of the Rules with intent to evade payment of duty. It was, submitted that the department can change the classification and on that basis recover excise duty only for a period of six months prior to the date of issuing the notice and for the period subsequent to the date of the notice and they cannot call upon the petitioner to pay duty right from 1-3-1975 as they now intend to do and as can be gathered from their demand for supplying information as regards production and clearance of the articles after 1-3-1975.

11. In our opinion this contention deserves to be accepted. Though this contention is not specifically taken in the petition, we have permitted the petitioner to raise the same as the petitioner has challenged recovery of excise duty on the articles manufactured by them on the ground that they fall under Tariff Item No. 68 and as the impugned show cause notice does not specify the period in respect of which power under Rule 9 is sought to be exercised. The correspondence to which our attention was drawn by the learned Advocate General discloses that the petitioner's factory was visited from time to time by the Excise Officers and they knew which articles were manufactured by the petitioner and by which process they were manufactured. The said articles were cleared by the petitioner as administration sets and not under any other name and the department had permitted the same without payment of duty in view of the aforesaid exemption notification. In 1975, the department had also taken samples of those articles. The information which the department wanted thereafter was supplied to the department though not immediately and for that reason the department was required to issue reminders. The petitioner had again submitted samples for examination by the department. It is, therefore, difficult to say that in removing the articles manufactured by it, even after 1-3-1975, the petitioner had committed any fraud or that it had made any misstatement or had

suppressed facts. It is nobody's case that there was any collusion on the part of the petitioner. Only a faint attempt was made by the learned Advocate for the respondent to bring the case within the proviso to Rule 10 by stating that the petitioner by not furnishing the information and submitting samples for examination had committed breach of the rules. As we have pointed out above, the correspondence clearly discloses that samples were made available by the petitioner to the department for examination in 1975 and 1977 and, therefore, it is not correct to say that the petitioner had failed to furnish the samples for examination even though it was called upon to do so and thereby it had committed a breach of the rules. As regard the information which the department had called for regarding the raw materials used and the method of production, the petitioner had made the same known to the department in 1973 itself as is evident by its letter dated July 4, 1973, Annexure "B" to the petition. It is not the case of the department that thereafter any change in the process had been effected by the petitioner. It is, therefore, not possible to accept the contention that the petitioner had not supplied the relevant information called for by the department and that it had done so with an intention of evading payment of duty. Moreover, in the show cause notice itself we do not find a single averment to the effect that the petitioner had committed any fraud or had made any wilful mis-statement or suppressed any relevant fact. So also, it is not mentioned in the show cause notice that the petitioner had committed breach of any rule. For this reason also the contention raised by Mr. Naik deserves to be rejected.

12. In that view of the matter, we declare that the proviso to Rule 10 is not attracted in this case and, therefore, it will be open to the department to recover duty for a period of six months prior to the date of the notice and not from 1-3-1975. Rule is made absolute accordingly with no order as to costs. Ad interim relief granted by this Court stands vacated.