
(1993) 03 MP CK 0004
In the Madhya Pradesh High Court
Case No : M. P. No. 1380 of 1990 (I.)

M/s. Godrej Food Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 07-03-1993

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A

Citation : (1993) 1 MPJR 425

Hon'ble Judges : V.S. Kokje, J;M.W. Deo, J

Bench : Division Bench

Advocate : M.S. Choudhary, for the Appellant; B.G. Neema, for the Respondent

Judgement

The following order of the Court was delivered By V. S. Kokje, J. :-- This is a petition challenging a show cause notice dated 19th/21st September, 1990 issued by the Collector of Customs and Central Excise, Indore. Invoking the larger limitation of 5 years u/s 11-A of the Central Excises & Salt Act, 1944 (hereinafter called the "Act").

The petitioners manufacture a product which they insist in "Soya Milk" whereas the Respondents contend that the product is not Soya Milk but is a beverage of Soya Milk waste product in different flavours which according to the Respondents can be described as "flavoured Soya Milk Beverages". The petitioners have placed on record material to support their contention that the product is nothing but "Soya Milk" and the Department had also placed material in support of their contention that the product is not "Soya Milk" but is flavoured Soya Milk beverages.

The impugned show cause notice has not started the controversy. It is already under the adjudicatory process provided by the Act. The earlier show cause notices No. TY(6)5/88/P/8894 dated 9-12-1988, MISC/NS/RV/88 dated 28-4-1989, MISC/NS/RV/88/642 dated 27-6-1989 and MISC/NS/RV/ 88/881 dated 22-9-1989 requiring the petitioners to show cause against the proposed

levy of excise duty as also the penalty were issued on the same basis on which the present show cause notice is issued. The petitioners filed a reply vide their letter dated 7th February, 1989 explaining their position. They had placed on record material in support of their reply also. They had filed written submissions also in the case. The Collector, Central Excise, Indore had before him the written submissions in detail filed by the petitioners as also 26 affidavits sworn in by consumers, retailers and wholesale dealers of the product of the petitioners. The Collector passed an order dated 13-2-1990. The petitioners aggrieved by the aforesaid order dated 13-2-1990 filed a petition in this Court which was registered as M. P. No. 425/90. The petition was dismissed on the ground that an equally efficacious alternative remedy by way of appeal under the Act was available. The petitioners preferred appeals before the Customs, Excise and Gold (Control) Appellate Tribunal which has not yet been decided.

The petitioners contend that the impugned show cause notice involves the same points which were involved in the earlier show cause notice on which an order has already been passed against them by the Collector and an appeal is pending before the Customs, Excise and Gold (Control) Appellate Tribunal (hereafter referred to as "CEGAT"). The petitioners further contend that in view of their experience as regards the earlier show cause notice it cannot be said that the appellate remedy under the Act is an equally efficacious remedy. They therefore contend that this Court in view of the peculiar circumstances of the case should decide the controversy on merits itself. Alternatively it is submitted that the impugned show cause notice has been issued beyond the normal period of limitation of six months taking advantage of the extended period of limitation of 5 years under proviso to Section 11-A of the Act Alleging that there was suppression of facts and wilful mis-statement on the part of the petitioners while getting the goods cleared. It is contended that there is no question of fraud or mis-presentation or suppression of facts involved in the case and, therefore, the show cause notice was beyond limitation and therefore was without jurisdiction.

The Respondents in their reply contended that in the circumstances of the case the petition was premature as only a show cause notice has been issued. It was also contended that the product was really "flavoured soya milk beverages" and not "soya milk" and that the process of manufacture was suppressed by the petitioners and, therefore, extended period of limitation under the proviso to Section 11-A of the Act was available to the Department.

Though, the petition was not formally admitted but a show cause notice was issued in response to which a detailed reply was filed and voluminous supplementary pleadings in the shape of rejoinders and reply to the rejoinders were filed by the parties. The case was therefore finally heard with the consent of the parties.

As the matter regarding correct classification of product is still under the adjudicatory process under the Act as the appeal against the order passed by the Collector on 13-2-1990 is still pending it would not be just or proper to decide

that question on merits in this case. Even otherwise, it is not for this Court to decide in a petition under Article 226 of the Constitution of India the correctness of classification of products in one category or the other. It is primarily for the departmental authorities to adjudicate upon such disputes after giving full opportunity of placing all the material on record to the parties. We would therefore only concentrate on the jurisdictional validity of the show cause notice.

This Court in *Universal Cables Ltd. v. Union of India & others* 1978 (2) ELT 632 has relying on decisions of the Supreme Court in *Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another*, *East India Commercial Co. Ltd., Calcutta and Another Vs. The Collector of Customs, Calcutta*, AIR 1962 SC 1893 and *N.B. Sanjana, Assistant Collector of Central Excise, Bombay and Others Vs. The Elphinstone Spinning and Weaving Mills Company Ltd.*, held that it is settled law that if a notice issued by Tribunal or Authority threatening to initiate proceedings prejudicial to a person is, on admitted facts in excess of jurisdiction, the Tribunal or Authority can be prohibited from further proceeding in the matter under Article 226 to save unnecessary harassment of the person concerned. In *Hindustan Electro Graphites Ltd. v. Union of India* 1990 (50) ELT 15 M. P. this Court has followed the decision in *Universal Cables Ltd.* case. There is, therefore, no doubt that if it is shown that the Respondents were not entitled to apply extended limitation of 5 years under proviso to Section 11-A of the Act, this Court can interfere and quash the show cause notice on the ground that it was issued beyond limitation and was therefore without jurisdiction.

That brings us to the applicability of the extended limitation under proviso to Section 11-A of the Act. In *Collector of Central Excise v. Chemphar Drugs & Liniments* 1989 (40) ELT 276 SC in Para 8 the law has been laid down in clear terms as follows:

In order to make the demand for duty sustainable beyond a period of six months and up to a period of 5 years in view of the proviso to sub-section 11-A of the Act, it has to be established that THE DUTY OF EXCISE HAS NOT BEEN LEVIED OR PAID or short-levied or short-paid, or erroneously refunded by reasons of either fraud or collusion or wilful misstatement or suppression of facts or contravention of any provision of the Act or Rules made thereunder, with intent to evade payment of duty. Something positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is required before it is saddled with any liability, beyond the period of six months. Whether in a particular set of facts and circumstances there was any fraud or collusion or wilful misstatement or suppression or contravention of any provision of any Act, is a question of fact depending upon the facts and circumstances of a particular case.

(Emphasis supplied)

This passage has been quoted and applied by Division Bench of this Court in Hindustan Electro Graphite Ltd. v. Union of India (supra).

The Supreme Court again had an occasion to pronounce on the point in Padmini Products v. Collector of Central Excise 1989(43) ELT 195 SC. Reiterating the observations made in the case of Collector of Central Excise v. Chemphar Drugs & Liniments (supra) it was observed that in order to claim the extended period of limitation of 5 years, it had to be established that the duty of excise had not been levied or paid or short-levied or short-paid by reason of either fraud or collusion or wilful misstatement or suppression of facts or contravention of any provisions of the Act or the Rules made thereunder with an intent to evade payment of duty it was further observed that mere failure or negligence on the part of the producer or manufacturer either not to take out a licence in case where there was scope for doubt as to whether licence was required to be taken or where there was scope for doubt whether the goods were dutiable or not would not attract Section 11-A of the Act. In the facts and circumstances of that case the Supreme Court found that there were materials on record to suggest that there was scope for confusion and the assessee believing that the goods came within the purview of concept of handicrafts were exempt. The Court observed that if there was scope for such a belief or opinion, then failure either to take out a licence or to pay duty on that belief, when there was no contrary evidence that the producer or the manufacturer knew that the goods were excisable or required to be licensed would not attract the penal provisions of Section 11-A of the Act.

From the aforesaid discussion it is clear that for applying Section 11-A of the Act in the case i.e. for applying the proviso to that section to extend the limitation to 5 years, it is necessary for the Excise Authorities to establish that the duty of excise had not been levied or paid or short-levied or short-paid by reason of either fraud or collusion or wilful misstatement or suppression of facts or contravention of any of the provisions of the Act or rules made thereunder, with intent to evade payment of duty. It is also clear that a mere mechanically repetition of the language of the provision in the show cause notice would not confer jurisdiction of the Collector of Central Excise to issue a show cause notice u/s 11-A of the Act beyond period of six months taking advantage of the proviso to the Section.

Examining the impugned show cause notice in the light of the aforesaid position of law, we find that beyond the allegation that the notices suppressed true and correct description of flavoured soya milk beverages in the classification list submitted during the period of notice i.e. 1987-88 and list No. 2/87-88 and No. 3/87-88, there is no other material to show that there was any fraud played upon to the Department. In the show cause notice it has been stated that on information dated 16-5-1988 the Collector came to know that instead of soya milk as declared vide their letter dated 5-5-1987 the notice are engaged in manufacture and clearance of beverages of soya milk waste product without

obtaining a valid Central Excise licence and payment of duty of excise levied thereon.

The petitioners have placed on record letter dated 27-1-1987 (Annexure P-1 to the petition) by which the petitioners wrote to the Assistant Collector, Central Excise, Bhopal informing him that the petitioners had an industrial licence for manufacture of soya milk and soya milk beverages and extruded soya foods. It was also stated in this letter that under Government of India Notification No. 286/86 dated 3-5-1986, Soya Milk and extruded soya protein have been exempted from central excise duty. A copy of the notification was also enclosed with the letter. Central Excise, Range-IV, Bhopal then wrote a letter dated 16-2-87 to the petitioners (Annexure P-2 to the petition) inviting their attention to notification No. 111/78 dated 9-5-1978 and calling upon the petitioners to file a declaration as per that notification. On 18th March, 1987 the petitioner filed the declaration form along with a list of Directors of Board and list of manufacturing process of the product. This letter along with its annexures is annexed to the petition as Annexure P-3. A bare reading of the process of soya milk manufacture shown in the chart annexed to this letter Annexure P-3 shows that mixing and blending of Vegetable oil, sugar, salt, Vitamin C, flavour colour, mango pulp, cocoa powder with the soya base is clearly shown in the process chart. In the foot note it is further clarified that the petitioners were making soya milk at that time in three flavours viz. Mango, Strawberry and Chocolate. The ingredients for each type of flavours were then given in the foot note. In the face of this representation to the Excise Authorities as back as 18-3-1987 it cannot be said that something material was suppressed from the Department on the basis of which extended period of limitation could be claimed under the proviso to Section 11-A of the Act. There is ample material on record to show that the petitioners bonafide believed that the product was exempt from duty. In any case, there is no material on record placed by the Department to establish that any material facts were suppressed by the petitioners or there was any misrepresentation on their part with the intention to evade duty. The extended period of limitation, under the proviso to Section 11-A of the Act is, therefore, clearly inapplicable in the facts and circumstances of the case in the light of the pronouncement of the Supreme Court in *Collector of Central Excise v. Chemphar Drugs & Liniments and Padmini Products v. Collector of Central Excise* (supra).

In the result, we find that the impugned show cause notice has been issued beyond the period of limitation of six months and there being no justification for application of extended period of 5 years of limitation under the proviso to Section 11-A of the Act. The show cause notice is without jurisdiction. We have no option but to quash it. The show cause notice F. No. V. (22)15-2/90/Adj./21251 dated 19th/21st, September, 1990 is hereby quashed. In the circumstances of the case we leave the parties to bear their own costs.