

(1981) 07 BOM CK 0013

In the Bombay High Court

Case No : Miscellaneous Petition No. 1469 of 1977

Navin Chimanlal Sutaria

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 16-07-1981

Acts Referred:

Citation : (1981) 8 ELT 913

Hon'ble Judges : B. Lentin, J

Bench : Single Bench

Judgement

Lentin, J.—The petitioner carries on business in the name and style of National Chemical Corporation and manufactures various chemicals including laboratory chemicals. For the manufacture of the chemicals different types of raw materials are required, one of them being N-Propyl Alcohol, which is an imported item. On 9th October, 1973, the petitioner imported six drums containing 960 kgs. of N-Propyl Alcohol. In the Bill of Entry, the petitioner classified it under Item 28 of the Indian Tariff Act, 1934. This classification was approved by the Customs Authorities and the goods were cleared on 13th November, 1973 by the petitioner after payment of duty at 60% ad valorem under Item 28.

2. On 22nd December, 1973, a notice of demand was addressed to the petitioner by the Assistant Collector of Customs for Rs. 67,961.50 said to be short-levy of duty on the ground that the proper classification was under Item 22(4)(a). On 24th December, 1973, the petitioner sent a reply to that notice of demand stating that when the goods were cleared he was under the genuine impression that the proper classification was under Item 28 and that he now understood that the goods were chargeable to duty at a higher rate under Item 22(4). By this letter the petitioner made a request to allow him to denature the goods as a special case. After a personal hearing given to the petitioner by the Assistant Collector (namely, the 2nd respondent), the 2nd respondent passed an order dated 30th September, 1975 confirming the demand notice dated 22nd December, 1973. On 26th December, 1975, the petitioner preferred an appeal to

the Appellate Collector (namely, the 3rd respondent) which was rejected by the 3rd respondent by his order dated 24th March, 1976. The petitioner's revision application to the Central Government was also rejected on 15th April, 1977 by the 4th respondent on behalf of the Central Government. Hence the petitioner has filed the present petition for setting aside the notice of demand dated 22nd December, 1973 and the impugned orders dated 30th September, 1975, 24th March, 1976 and 15th April, 1977 passed by the Assistant Collector, the Appellate Collector and the Central Government respectively.

3. At the outset, it would be pertinent to advert to the relevant items, namely, Items 22(4) and 28. Item 22(4), which is under the heading "Products of the Food preparing Industries; Beverages, Alcoholic Liquors and Vinegars; Tobacco;" reads as under :-

Item 22(4) refers to notification dated 5th September, 1970 which states that :-

"..... the Central Government..... hereby exempts Propyl Alcohol when imported into India and used for industrial or research purposes for so much of the duty of customs, including the additional duty if any leviable thereon under the Indian Tariff Act, 1934 (32 of 1934) as is in excess of 60 per cent ad valorem :

Provided that either the process of manufacture of the product in which the said alcohol is to be used is conducted in bond in accordance with such conditions as may be prescribed in this behalf by the Assistant Collector of Customs or the said alcohol on importation is stored in a bonded warehouse and issued from bond in such small quantities and subject to such conditions as may be decided by the Assistant Collector of Customs."

Item 28 reads as under :

"Chemicals, drugs and import of provisional goods not otherwise specified."

The duty attracted under this Item is 60% ad valorem.

4. It was urged by Mr. Taraporewala, the learned Counsel appearing on behalf of the petitioner, that only potable spirits would fall under Item 22(4)(a). Mr. Taraporewala urged that the petitioner had correctly classified his N-Propyl under Item 28, as it is not potable, being an organic solvent and denaturing agent used for the manufacture of chemicals and is a chemical falling under Item 28. He further urged, and this is not in dispute, that the import licence against which the product was imported was issued for the import of laboratory chemicals. He further urged, and this is also not in dispute, that even under the licensing policy for the relevant year, N-Propyl Alcohol was classified as a chemical. In these circumstances, Mr. Taraporewala urged that the product imported by the petitioner being a chemical was correctly classified by him in the Bill of Entry under Item 28 assessable to duty at 60% ad valorem.

5. On the other hand, it was urged by Mr. Advani, the learned Counsel appearing

on behalf of the respondents, that it was only for the first time in the petition that the petitioner had raised the issue of the N-Propyl Alcohol falling under Item 28 and that prior thereto the petitioner had consistently admitted his error in classifying the product under Item 28 and had sought the benefit of the exemption notification dated 5th September, 1970. Mr. Advani urged that the respondents were justified in rejecting the petitioner's claim to the benefit under the notification date 5th September, 1970 and holding that the imported product fell within Item 22(4)(a).

6. I shall deal with Mr. Advani's contentions straightaway and get them out of the way. To start with, at the earliest point of time, namely, in the notice of demand dated 22nd December, 1973, the stand taken by the department was that the duty was assessable not under Item 28 but under Item 22(4)(a). All that petitioner did by his reply dated 24th December, 1970 was to state that he was under the genuine impression that the item applicable was Item 28 but that since the department claimed that the proper item was 22(4)(a), he asked the department to allow him the benefit of the exemption notification dated 5th September, 1970. It is obviously that the petitioner did so because the duty attracted by the notification and by Item 28 was the same. This letter must be read in its proper perspective and the spirit in which it was written. As the duty under Item 28 and the notification was the same, all that the petitioner wanted to convey to the department by this letter was - since you say the item applicable is Item 22(4)(a), then give me the benefit of the exemption notification. Thereby the petitioner cannot be said to have given up his contention that the correct item applicable is Item 28. Yet, all the authorities have erroneously proceeded on the assumption that because the notification did not apply to the petitioner, he automatically came within the ambit of Item 22(4), without making any endeavour to ascertain whether Item 28 was attracted, despite the petitioner's repeated protestations to that effect in his submissions and memos of appeal before the various authorities. It had also been urged before the 2nd respondent N-Propyl Alcohol is not potable in support whereof an expert opinion was produced, and that it is a solvent and a chemical intermediate in support whereof the Encyclopaedia of Chemical Technology by Kirk and other standard books were referred to before the 2nd respondent. However, in his impugned order dated 30th September, 1975 all this has not only been not considered but has been totally ignored by the 2nd respondent who has proceeded on the footing that because the benefit of the exemption of 5th September, 1970 was not applicable to the petitioner, he fell under Item 22(a), without even considering the applicability of Item 28. Even before the Appellate Collector, namely, the 3rd respondent, as is manifest from his order, it was urged, by the petitioner that the imported material is a laboratory chemical and that the import licence under which it was also issued for laboratory chemicals. It was also urged that the petitioner should be granted the benefit of the exemption notification. However, even the 3rd respondent's order dated 24th March, 1976 merely proceeds to reject the petitioner's plea for exemption under the

notification and without even considering the petitioner's other contentions, proceeds to classify the goods as being attracted for duty under Item 22(4)(a). In the revision memo filed by the petitioner, a ground has specifically been taken that for the reasons stated therein the petitioner's goods fell under Item 28 and not under Item 22(4)(a). This has been adverted to by the revisional authority in its impugned order dated 15th April, 1977. But that is all. Merely setting out the petitioner's contentions is not tantamount to application of mind with regard thereto, and without doing so and on the wholly untenable basis that the petitioner claimed classification under Item 28 for the first time, the revisional authority held that the petitioner did not fall within the exemption notification and hence Item 22(4)(a) was attracted. As a tentative rider the penultimate sentence of the order states that "in any event, the goods are not classifiable under item 28 LT". Not a vestige of reasoning is given for this off-handed and perfunctory conclusion.

7. This discussion is intended to demonstrate the futility of Mr. Advani's contention that the issue of the goods falling with Item 28 has been raised for the first time in the present petition. It is nothing of the kind. On the contrary, the approach of all the authorities was that as the goods did not attract the exemption notification, they automatically fell within Item 22(4)(a). This approach has nothing to commend itself except its untenability. Even if the goods did not attract the benefit of the exemption notification, Item 22(4)(a) could not be automatically attracted, more so in the teeth of the petitioner's contentions that the goods fell within Item 28, in support whereof he produced an expert opinion and cited standard technical books. All this was totally ignored. If it was the department's stand that the goods fell within Item 22(4)(a), which in fact was the stand of the department as is manifest from the notice of demand dated 22nd December, 1973, the burden of proof was on the department, as observed by the Supreme Court in *Deputy Commissioner of Agricultural Income Tax and Sales Tax, Quilon v. Travancore & Tea Co.*, (1967) 20 STC 529 -

".....In all cases of taxation the burden of providing necessary ingredient laid down by law to justify taxation is upon the taxing authority.....".

These observations were also followed by a Division Bench of this Court in *Amar Dye Chem. Ltd. v. Union of India* (1980) CenCus 242. This elementary and salutary rule of law has, in this case, been entirely ignored by the department.

8. Under Item 22(4) "spirits" (other than denatured spirit) are illustrated as "Brandy, Gin, Whisky and other sorts of spirits not otherwise specified, including wines containing more than 42% proof spirit". It is manifest that the "spirits" envisaged by Item 22(4) must necessarily be potable spirits. The words "not otherwise specified" in Item 22(4) cannot be read to include spirits other than potable spirits. This is brought to the forefront from the description of the spirits appearing before and after the words "not otherwise specified". These words must be read in the context in which they appear, not in isolation from the other words in that item and must receive colour from the words preceding and

succeeding them. It is, therefore, clear that the petitioner's N-Propyl Alcohol could not be brought under Item 22(4)(a). Being an unpotable organic solvent and a denaturing agent, it is clearly a chemical, assessable to duty under Item 28. Yet another aspect which clearly indicates that N-Propyl Alcohol is a chemical is to be found in the Import Trade Control Policy, 1972-73 (Vol. 1) itself where N-Propyl Alcohol is classified as a chemical. In the index it is shown under Part V of the Import Trade Control Schedule the serial numbers whereof are 22-31. Under Part V at page 51 serial No. 22(b) states "Other Chemicals". The detailed policy regarding chemicals is to be found in Appendix 28 at page 196. This is yet another factor which brings to the forefront that N-Propyl Alcohol is a chemical and hence liable to duty not under Item 22(4)(a) but under Item 28. In *H. R. Syien v. P. S. Lulla*, 72 Bom. L.R. 534, it was held by this Court that entries in the Index attached to the Import Trade Control Schedule are of the nature of aids to construction not necessarily legal and binding but which aids should be invoked in the case of doubt or difficulty in order to throw light upon what was intended by the broad classification and broad entries in the remarks column in the Schedule. While in the present case there can be no doubt or difficulty in holding that the petitioner's N-Propyl Alcohol is not assessable to duty under Item 22(4)(a), the reference to the Import Trade Control Policy by me is to demonstrate that the department itself should have considered the petitioner's N-Propyl Alcohol as a chemical and classified it as liable to duty under Item 28. It is all these factors that go to the root of the matter and clearly demonstrate non-application of mind by the authorities in passing the impugned orders which merit interference.

9. It is futile for Mr. Advani to urge that because in his letter dated 24th December, 1973 the petitioner said that he committed a mistake in classifying the goods under Item 28 and because he applied for classification under the exemption notification, he is deemed to have given up his contention that the item applicable was Item 28. As stated earlier that letter (somewhat loosely paraphrased by Mr. Advani) must be read in its proper perspective. It is well-settled that in cases of taxation there is no estoppel. If at all any authority is necessary for this proposition the same is to be found in *Dunlop India Ltd. v. Union of India*, AIR 1977 S.C. 597. Merely because the petitioner claimed the benefit of the exemption notification did not estop the petitioner from claiming the benefit of Item 28 which he initially did and was approved and accepted by the department at the time of clearance. Irrespective of the petitioner thereafter claiming the benefit of the exemption notification, it was in the light of the Import Trade Control Policy which itself classified N-Propyl Alcohol as "chemical", the bounden duty of the department to have treated it as assessable to duty under Item 28. There was absolutely no warrant for all the authorities to come to the conclusion that if the exemption notification did not apply, the item automatically applicable would be Item 22(4) without applying their minds whether Item 28 was attracted, which in this case it was.

10. Mr. Advani urged that Item 22 encompasses all forms of Alcoholic liquors and

not only potable liquors, inasmuch as Item 22(5)(c) refers to Perfumed spirits. The fallacy of Mr. Advani's contention is to be found from the very heading under which Item 22 stands, viz. "Food Preparing Industries; Beverages, Alcoholic Liquors and Vinegars; Tobacco". Apart from the description of the spirits in Item 22(4), the very heading Item 22 is clear indication that it is intended to cover potable spirits and not a chemical like N-Propyl Alcohol which is an organic solvent and a denaturing agent.

11. In the result, the petition is allowed and the impugned notice of demand dated 22nd December, 1973 and the impugned orders dated 30th September, 1975, 24th March, 1976 and 15th April, 1977 are set aside. Rule is made absolute. There will be no order as to costs.

12. I am informed that since 6th March, 1976, the department has sealed the imported goods in the petitioner's factory. The seals shall be removed forthwith.