

(1995) 11 KAR CK 0028

In the Karnataka High Court

Case No : Writ Appeal No. 2963 of 1991, (On appeal from 1991 (56) E.L.T. 518 (Kar.) .)

N.G.E.F. Limited

APPELLANT

Vs

Assistant Collector of C. Ex., Bangalore

RESPONDENT

Date of Decision : 21-11-1995

Acts Referred:

Central Excise Tariff Act, 1985 — Section 11 A

Citation : (1997) 95 ELT 480

Hon'ble Judges : M.L. Pendse, J;B. Padmaraj, J

Bench : Division Bench

Advocate : Shri A.M. Subbaiahfor G.B. Shastry, for the Appellant; Shri Ashok Harnahalli, C.G.S.C., for the Respondent

Judgement

1. The appellant is a Company registered under the Companies Act and, inter alia, manufactures Transformers, Electric Switch Gears, Switch Boards and other Electrical Goods. The Company also manufactures Electrical Laminations and Stampings which are liable to payment of duty under Entry 28A of the First Schedule to Central Excises and Salt Act, 1944. On April 1, 1980, the Company filed classification list 17/1980 and the list was duly approved by the Excise Authorities. The Company had claimed that manufacture of Electrical Laminations and Stampings are liable to payment of excise duty under Tariff Item No. 28A of the First Schedule.

2. After the Classification List was approved by the Excise Authorities on June 18, 1980, the Company preferred Writ Petition No. 31466/1981 under Article 226 of the Constitution in this Court to challenge the validity of Entry 28A and the classification and levy of excise duty on Electrical Laminations and Stampings manufactured by the Company. On institution of the writ petition, the Company secured order on December 10, 1981. The learned Single Judge admitted the petition and issued injunction restraining the Department from taking any steps or proceedings whatsoever from levying or collecting, demanding or recovering

any duty under Tariff Item 28A of the First Schedule to the Act in respect of the Laminations manufactured by the Company for being captively consumed in the manufacture of Transformers.

It is required to be stated that the Company adopted a special procedure prescribed under Chapter [VII-A] and returns were filed in Form RT 12 and the Officer was required to assess the returns under Rule 173-I. The Excise Officer was restrained by this Court from making any assessment in pursuance of the returns filed by the Company. The Writ Petition filed by the Company ended in dismissal by order dated October 4, 1985. The learned Single Judge dismissed the petition on the ground that the Company had an alternative efficacious remedy of filing appeal. The Company agreed to lodge the appeal within a stipulated period and the learned Single Judge granted permission to prefer appeal on condition that the Company deposits 25 per cent of the excise duty before lodging the appeal and another 25 per cent within 3 months from the date of filing of the appeal. The appeal preferred by the Company ultimately was disposed of by order dated November 30, 1984 and the Collector of Central Excise (Appeals) set aside the Order of classification and remitted the matter back to the Assistant Collector to decide afresh the classification of the goods on the basis of evidence, if any, and also to decide the question of refund of duty if classification is revised by the Assistant Collector.

3. On March 21, 1988, the Assistant Collector of Excise, Bangalore, served show cause notice upon the Company after setting out the relevant facts mentioned hereinabove. The show cause notice calls upon the Company to explain why the Laminations manufactured should not be classified as the Electrical Laminations falling under erstwhile Tariff Item 28A and now excisable under Chapter 83 of the Central Excise Tariff Act, 1985. The show cause notice further calls upon the Company to explain why the central excise duty of Rs. 1,75,75,571.67 paise provisionally assessed should not be finally assessed and recovered. The show cause notice further calls upon the Company to explain why the refund claimed should not be disallowed and why the Classification List dated 31-12-1985 filed by the Company claiming that the goods were non-excisable should not be rejected. The Corrigendum was issued on July 13, 1988 inserting the words "under Rule 9B of the Central Excise Rules read with Section 11A of the Central Excise Act" after the words "recovered" in respect of duty provisionally assessed. The Company preferred Writ Petition under Articles 226 and 227 of the Constitution to challenge the legality of the show cause notice issued by the Assistant Collector.

4. The gravamen of the complaint of the Company was that the Assistant Collector had no jurisdiction to issue show cause notice claiming to have provisionally assessed the duty payable by the Company and threatening to penalize the same and recover it under Rule 9B. It was claimed by the Company that the show cause notice was barred by provisions of Section 11A of the Act. The Company asserted that the Excise Authorities had not passed any order of

provisional assessment and consequently the show cause notice making demand of the excise duty was not sustainable.

The learned Single Judge by impugned judgment dated June 11, 1991 dismissed the petition rejecting the contentions urged on behalf of the Company. The decision of the learned Single Judge has given rise to the filing of the present appeal.

5. The learned Counsel for the appellant submitted that the demand made by the show cause notice was barred by provisions of Section 11A of the Act. It was urged that the Excise Authorities had not passed any order of provisional assessment as contemplated under Rule 9B of the Central Excise Rules and the claim made in the show cause notice on that count, is not correct. It was then urged that the earlier Writ Petition filed by the Company ended in dismissal on October 4, 1985 and restraint issued by this Court came to an end. The learned Counsel submitted that order of provisional assessment was passed after a period of more than 6 months from that date and consequently the show cause notice should be struck down as issued beyond period of limitation. We are unable to find any merit in the contention. In the first instance, the Excise Authorities were restrained from taking any steps or proceedings for levy, collection, demand or recovery of any duty in respect of the goods manufactured by the Company. Explanation to sub-section (1) of Section 11A of the Act clearly provides that where the service of notice is stayed by an order of Court, the period of stay shall be excluded in computing the period of 6 months or five years, as the case may be. In view of the restraint order issued by this Court, the Excise Authorities were prevented from taking any steps to pass order of assessment in pursuance of RT 12 Forms filed by the Company. It is difficult to appreciate as to how the Company can now turnaround and claim that the Excise Authorities failed to pass orders of provisional assessment on RT 12 Forms from time to time and, therefore, it was not open to pass such an order long after October 4, 1985. It cannot also be overlooked that the Company by adopting a special procedure prescribed under Chapter VIII-A returns were filed in Form RT 12 and consequently the Officer was required to assess the returns under Rule 173-I. The Officer was restrained from doing so till October 4, 1985. Thereafter, it was permissible for the Officer to pass provisional order of assessment and the Excise Authority has done so. The Division Bench of this Court to which one of us (Chief Justice) is a party, held in the judgment reported in "Chairman, CBEC and Others Vs. Davangere Cotton Mills, that the provisions of Section 11A of the Act cannot be imported while determining the duty payable under Rule 173-I of the Rules. The Division Bench further held that the assumption that the recovery can only be made by resorting to Section 11A is not correct and the assessment when completed under Rule 173-I, the question of recovery under [Section] 11A of the Act did not arise. In view of the decision of the Division Bench with which we are in agreement, the contention of the learned Counsel for the appellant that the show cause notice was issued beyond period prescribed u/s 11A cannot be accepted. The contention that the Excise Authorities had not passed an order of

provisional assessment till the date of service of show cause notice under challenge is also without any merit. The record does not indicate when the order of provisional assessment was passed and it is not permissible to assume that such order must have been passed on the date of issuance of the show cause notice. In our judgment, the Excise Authority had ample jurisdiction to pass order of provisional assessment and issuance of show cause notice, cannot be disturbed in exercise of writ jurisdiction. It is obvious that by securing an interim order from this Court, the Company had postponed payment of duty of over Rs. one crore for the last several years and the filing of the writ is nothing but a ruse to further postpone the order of adjudication determining the duty payable and recovery thereof. We decline to exercise writ jurisdiction on the facts and circumstances of the case. Apart from that, even on merits, we do not find any acceptable claim. In our judgment, the order of the learned Single Judge is not required to be disturbed and appeal must fail. Accordingly, appeal is dismissed with costs.