(2010) 10 AHC CK 0016

In the Allahabad High Court

Case No : Writ Petition (Tax) No''s. 1289-1290 and 1334 of 2003

N.K. Laminates Pvt. Ltd. APPELLANT

Vs

Superintendent (CP), Central Excise RESPONDENT

Date of Decision : 27-10-2010

Acts Referred:

Central Excise Rules, 1944 — Rule 8(1)
Central Excises and Salt Act, 1944 — Section 12, 18
Criminal Procedure Code, 1973 (CrPC) — Section 165, 165(1)
Customs Act, 1962 — Section 105, 105(1), 105(2)

Citation : (2010) 10 AHC CK 0016

Hon'ble Judges : Yatindra Singh, J;Rajes Kumar, J

Bench : Division Bench

Judgement

1. The petitioners are manufacturers. However, classification of their product is disputed. It is for this reason a search was conducted at their units under Central Excise Act, 1944 (the Excise Act). These writ petitions revolve around legality of the same.

The facts

2. The Central Government has framed Central Excise Rules, 1944 (the Rules) under the Excise Act. In pursuance of the powers confirmed under Rule 8(1) of the Rules, the government issued a notification on 10-2-1986 (the exemption notification) listing the goods that were exempt from the excise duty. Entry no. 6 of this notification is ''Kattha (Catechu)'': it is exempted from duty.

3. The exemption notification was amended on 1-3-2003. Entry no. 6 now stands as ''Kattha (Catechu) excluding Gambier''.

4. Traditionally, Kattha is manufactured from Khair wood. It is exempted from excise duty. The petitioners case is that:

It can be manufactured from Gambier, which is imported from outside; They purchase Gambier from the market and manufacture Kattha from it. They are not liable pay excise duty.

5. The Central Excise Department at Kanpur (the Department) disputed the claim of the petitioners. They started investigating it.

6. A search was conducted on 4th September, 2003 in six units in Kanpur. Out of these six, we are concerned with the three that are petitioners in WP (Tax) 1289 of 2003 (the first WP), WP (Tax) 1290 of 2003 (the second WP), and WP (Tax) 1334 of 2003 (the third WP).

7. The goods as well as the records of the searched units were seized and three samples of the goods were made. One sample was given to the petitioner, one was sent to Central Revenue Control Laboratory, Pusa Road, New Delhi (the CRCL), and one was kept by the Department.

8. The notices were issued to them on 10-10-2003 requiring them to register their product as classifiable under chapter sub-heading 1301.10 (Lac; gum, resin and other vegetable saps and extracts in or in relation to which any process is carried on with the aid of power).

9. The petitioners filed these WPs against search and seizure as well as the notices dated 10-10-2003.

10. During pendency of the WPs, the following developments have taken place :

The CRCL has sent its report on 9-12-2003. Thereafter, the Department sent a sample each to U.P. State Public Analyst, Lucknow (the State Analyst) for examination. He has also sent his report on 14-10-2004 to the Department.

The Department has sent notices to the petitioner in the first and third WPs on 31-8-2004 and a notice dated 29-7-2004 to petitioner in the second WP requiring them to pay excise duty and penalty.

The copies of the reports as well as notices were produced before the court after giving copies to the counsel for the petitioners.

Points for determination

11. We have heard Sri Bharat Ji Agrawal, Sri SD Singh, and Sri Dinesh Prakash, counsel for the petitioners and Sri S.P. Kesarwani and Sri B.K.S. Raghuvanshi for the respondents. The following points arise for determination :

(i) Whether the goods manufactured by the petitioners are exempt from excise duty?

(ii) Whether there is any reason to believe for conducting the search?

(iii) Whether the reasons should be personally recorded by the empowered officer?

(iv) Whether the approval for search was to be obtained from the Director General, Central Excise Intelligence (the DGCEI)?

(v) Whether there was no application of mind for ordering search?

1st point : Exciseable or non -- not decided

12. The counsel for the petitioner submits that:

? The petitions are manufacturing Kattha;

? It is exempt from excise duty; and

? No search could be conducted in the premises.

13. The case of the petitioners is that the goods manufactured by them is Kattha. In this regard they submit that:

? The other wings of the Government treat it as Kattha;

? The raw material of their product is Gambier. Except Kanpur, it is treated as Kattha in rest of the country by the Department;

? The petitioners cannot be discriminated.

14. The question whether the goods manufactured by the petitioners are liable to excise duty or not, is disputed by the Department. This require investigation into question of fact. It cannot be gone into in the writ jurisdiction.

15. The petitioners have been served with the notices dated 10-10-2003 to get themselves registered. Subsequently, notices have also been issued by the Department on 31-8-2004 to the petitioners in first and third WPs and on 29-7-2004 to the petitioner in the second WP to deposit excise duty and penalty. The question whether the product is liable to excise duty or not will be decided in these proceeding and not here in the writ jurisdiction.

16. As we are not expressing our opinion on the merit of the case, we do not wish to say anything except that the Department cannot adopt discriminatory approach: the manufactured goods from Gambier cannot be treated as Kattha (and exempt it from excise duty) at some places and at others as an excisable item. The Department has to adopt one standard; either it is treated as Kattha and a non-excisable item by the excise department or is not treated as Kattha consequently an excisable item: there cannot be discrimination areawise. We leave the matter here.

17. The petitioner may appear before the authority of the Department, that has issued notices to them in the week commencing 21st November, 2010 along with their objections and evidence in support of the same. Thereafter, the objection of the petitioners may be decided by a reasoned order. Different Authorities have issued notices to the petitioners. It would be convenient to consolidate the proceedings and decide them together. Needless to add the question of payment of excise duty or penalty, if any, will only arise if the petitioners are manufacturing excisable goods.

2nd point : Reasons are there

18. The counsel for the petitioners cited lakhmani Mewal v. ITO, 103 LTR 437 and submitted that the reasons to believe must be relevant and should exist before the search is ordered.

19. There is no dispute so far as the aforesaid proposition is concerned. The reasons have to be relevant and must exist before a search is ordered. It is on their basis that the search is conducted. Let''s consider, if reasons are there or not and whether they are relevant.

20. The Department has produced the original record of the case where the reasons were recorded. A Photostat copy of the documents were also given to the counsel for the petitioners.

21. The record indicates that even prior to the amendment of the exemption notification, there was doubt, whether the goods manufactured by the petitioner from Gambier was exempt from excise duty or not. In this connection, investigations were going on.

22. The Superintendent of the Department submitted a note (see Appendix-1) on 22-3-2003. It indicated the following reasons for conducting the search :

(i) The Units are engaged in manufacture of product by processing Gambier and Khair wood and under the guise of Kattha, no excise duty is being paid;

(ii) The Food and Adulteration Department has clarified that neither Kattha can be manufactured from Gambier, nor the product manufactured from Gambier can be marketed as Kattha;

(iii) The goods manufactured from Gambier is not Kattha as per clarification from the Food and Adulteration Department and ISI specifications for Kattha;

(iv) The goods manufactured from Gambier classified in the CSH 3201 as Tanning Extract, on the basis of classification of Gambier in the Customs Tariff and as mentioned in corresponding Bill of Entry filed by the importers. It is liable for payment of 16% ad valorem excise duty.

23. The Assistant Commissioner is the empowered officer to order the search. On the note of the Superintendent, he made the following noting/order on 25-3-2003 :

Please conduct the necessary search and get the relevant records from all the unit involved in the manufacturing of Gambier extract and also put up a letter to DGCEI mentioning the details of intelligence.

24. The reasons are there in the note of the Superintendent. They are relevant and were in existence prior to the order for the search. It is on their basis, the search was ordered by the empowered officer on 25-3-2003. Thereafter, some officials were authorised and search was conducted on 4-9-2003. However, the question is, should they be personally recorded by the empowered office?

3rd point : Not necessary to personally record reasons

25. The counsel for the petitioner cited The Commissioner of Commercial Taxes and Others etc. Vs. R.S. Jhaver and Others etc., (the Ramkishan case) and submitted that:

(i) In view of Section 18 of the Excise Act, the search is made in accordance with the provisions of Code of Criminal Procedure, 1973 (the CrPC).

(ii) The conditions for conducting the search are mentioned in Section 165 of CrPC.

(iii) In Ramkishan case, section 165 CrPC has been interpreted and it has been held that,

? The empowered officer must have reasonable grounds for believing that anything necessary for the purpose of recovery of tax may be found in any place within his jurisdiction;

? He must be of the opinion that such thing cannot be otherwise got without undue delay;

? He must record in writing the grounds of his belief; and

? He must specify in such writing so far as possible the thing for which the search is to be made. After he has done these things, he can make the search.

(iv) In this case reasons have not been recorded personally by the empowered officers;

(v) The search is illegal.

26. Section 18 of the Excise Act provides that all search and arrest shall be carried in accordance with the provisions of Code of Criminal Procedure. Section 165of the CrPC is titled ''Search by police officer''. It provides how a search is to be conducted.

27. The Supreme Court in the Ramkishan case was concerned with the constitutionality of Section 41 of Madras General Sales Tax Act, 1959 (the Madras Act). The proviso to sub-section (2) of Section 41 [Section 41(2)] of the Madras Act provided that so far as may be, all searches be made in accordance with provisions of CrPC. The Madras High Court had held that:

(i) Sub-sections (2) to (4) of Section 41 of Madras Act were ultra vires the Constitution;

(ii) The warrant issued by the Magistrate for search of the residential accommodation was bad as Magistrate had not applied his mind before issuing the same.

The Supreme Court reversed the Madras High Court judgment on the first point but agreed with its second conclusion and dismissed the appeal.

28. In the Ramkishan case, the Court was not concerned with the question involved in the present writ petitions; there the court was concerned with the constitutionality of the Madras Act and was considering whether sufficient safeguards were provided u/s 41 of the Madras Act or not. It is in this light that the Supreme Court made some observations.

29. The Supreme Court in the Ramkishan case was neither concerned with the question whether empowered officer should record the reasons personally, nor in that case the order of the empowered officer was challenged on this ground. The Supreme Court has also neither held, nor made any observations that in case reasons are not recorded personally by the empowered officer then the order would be vitiated.

30. Section 12 of the Excise Act provides that the Central Government may apply the provisions of the Customs Act, 1962 (the Customs Act) with such modifications and alterations as it may consider necessary.

31. By the Notification No. 68/63-CE., dated 4-5-1963 as amended from time to time, sub-section (1) of Section 105 [Section 105(1)] of the Customs Act with suitable modifications has been applied in the Excise Act.

32. Sub-section (2) of Section 105 [Section 105(2)] of the Customs Act applies CrPC so far as search under the Customs Act is concerned. It is similar to Section 18 of the Excise Act.

33. Sections 105(1) and 105(2) apply Section 165 CrPC to a search under the Customs Act. They came to be interpreted in R.S. Seth Gopikrishan Agarwal Vs. R.N. Sen, Assistant Collector of Customs and Others, (the Gopikishan case). In the Gopikishan case also, a similar argument was raised but was negated.

34. In the Gopikishan case, the Supreme Court held that the searches under Sections 105 of the Customs Act and 165(1) CrPC are intended to meet different situations : Section 165 CrPC applies only to the case where search is urgently required and search warrant cannot be obtained in the ordinary course. The conditions mentioned in Section 165(1) CrPC do not apply to Section 105 of the Customs Act. The Supreme Court observed,

[I]n our view, S. 105 of the Act and S. 165(1)of the Code of Criminal Procedure are intended to meet totally different situations....[U]nder S. 105 of the Act the Assistant Collector of Customs either makes the search personally or authorises any officer of Customs to do so, if he has reason to believe the facts mentioned therein. Under S. 165(1)of the Code of Criminal Procedure the recording of the reasons for believing the facts is only to enable him to make a search urgently in a case where search warrants in the ordinary course cannot be obtained. It is, therefore, not possible to invoke that condition and apply it to a situation arising under S. 105 of the Act.

35. The same reason applies here. The order for conducting the search cannot be voided on the ground that the empowered officer has not personally recorded the

reasons.

36. The object of search is to find out goods or documents that may be useful and necessary in the proceeding pending or contemplated under the Excise Act. The only requirement for the search is that there should be reasons to believe to conduct the search and they should be relevant. This is also so held in Durga Prasad v. H.R. Gomes, 1983 (13) E.L.T. 501 :

The object of grant of power under S. 105 is not search for a particular document but of documents or things which may be useful or necessary for proceedings either pending or contemplated under the Customs Act... The power of search granted under S. 105of the Customs Act is a power of general search. But it is essential that before this power is exercised, the preliminary conditions required by the section must be strictly satisfied, that is, the officer concerned must have reason to believe that any documents or things, which in his opinion are relevant for any proceeding under the Act, are secreted in the place searched.

37. The note submitted by the Superintendent is typed and thereafter the noting is by the empowered officer in his hand writing. The noting of the empowered officer indicates that he agreed with the reasons and has applied his mind; thereafter he has passed the order for necessary search to get the relevant records.

38. In our opinion,

? The reasons to believe is mandated by Section 12 read with Section 105(1) of the Customs Act.

? It is not necessary for the empowered officer to record them personally.

? In the present case, the reasons were there. They were approved by the empowered officer. Thereafter, the order for search and seizure was made.

? This is sufficient compliance for conducting search under the Excise Act.

39. The counsel for the petitioner submits that:

? The empowered officer has neither used the word ''approved'' nor ''agreed'' while making his noting; and

? This shows that there was no approval under the Act.

40. In Gopikishan case, a similar question was raised that the authorisation given by the empowered officer did not say that he had reasons to believe. The court (in paragraph 6) held that:

Though the words "reason to believe" are not in terms embodied in the authorisation, the phraseology used in effect and substance meant the same thing.

41. Here also, the words ''approved'' or ''agreed'' are not specifically used but

there are ways of expression: language is used in different ways by different people but what is to be seen is the substance of it.

42. The empowered officer made his noting immediately after the note of the Superintendent. He has indicated that the search should be conducted and relevant records should be obtained. This indicates that he has approved the reasons given by the Superintendent.

4th point: Approval -- not necessary from the DGCEI:

43. The counsel for the petitioner submits that:

? In this case approval was to be given by the DGCEI as mentioned in the noting of the empowered officer;

? This was not done;

? The entire search was illegal.

44. This case was not unique to Kanpur but the same reasons applied to all such units in the country. It is for this reason that the note of the Superintendent indicated the name of some of the units and it was mentioned that a letter be written to the DGCEI to cover all such units. The later part of the note of the empowered officer talks about getting approval of the letter that was to be sent and not about the approval for conducting search by the Department.

45. In our opinion, there was neither any requirement, nor was it indicated by the empowered officer to get approval of the DGCEI for the search.

5th point: There cannot be general order :

46. The counsel for the petitioners submitted that:

? The names of the units are not indicated in the note of the empowered officer;

? There cannot be general order to search all the units in Kanpur;

? It cannot be said that there has been any application of mind.

47. The note of the Superintendent indicates three units namely, M/s. N.K. Laminates, M/s. Brij Kattha, and M/s. Balram Wood Products. There is also recommendation for writing a letter to the DGCEI informing him details of the intelligence report to cover the similar units within jurisdiction of other commissionerates. The report is confined to three units though the recommendations is there for the other similar units in the Kanpur Commissionerate.

48. The empowered officer agreed with the report. Out of these three, two are at the petitioners in the first and third WPs. There is nothing on record to show that there was specific approval to conduct search in Kanchan Udyog.

49. The search is a serious matter. There cannot be general order for search:

either the report should have indicated the names of such units and then agreed upon by the empowered officer, or the empowered officer should have indicated the same.

50. In our opinion,

? There is no application of mind for conducting the search of Kanchan Udyog;

? The search conducted on M/s. N.K. Laminates and Brij Kattha Industries is valid; whereas the search of Kanchan Udyog is illegal.

51. In view of our finding on this point, the Department has to return the seized goods and documents of Kanchan Udyog. However, it will be open to the Department to (for citations see below)1:

? Take photocopies of the documents;

? Use the documents in the proceeding to be decided by the Department.

Conclusions:

52. Our conclusions are as follows :

(a) The reasons to conduct the search are there;

(b) The reasons to conduct the search need not be personally recorded by the empowered officer, but he should apply his mind and approve the same;

(c) The search conducted on M/s. N.K. Laminates and Brij Kattha Industries is valid; whereas the search conducted on Kanchan Udyog is illegal;

(d) The Department may return the goods and documents seized from Kanchan Udyog though it is entitled to keep photostat copies of the documents and use the same in the assessment proceeding;

(e) The party may appear before the relevant officers in the Excise Department at Kanpur in the week commencing 22nd November, 2010 and file their objection and evidence. Thereafter, the question whether their product is excisable or not may be decided by a reasoned order in accordance with law. It will be open to the Department to consolidate the cases so far as common question relating to the excisability of the goods are concerned.

53. With the aforesaid observations, the WPs are disposed of.

Appendix-1

The notice submitted by the Superintendent on 22-3-2003 indicating the reasons is as follows :

On the basis of intelligences and clarifications received from the Food and Adulteration Department, search operations were conducted in the manufacturing premises of the units engaged in the manufacture and clearance of products obtained from the processing of Gambier and Khair Wood together, in the guise of Kattha & availing the benefit of Notification No. 76/86, as amended. No Central Excise formalities like Registration, payment of Central Excise duty etc. were made by these units, The Food & Adulteration Department has very categorically clairified that Kattha cannot be manufactured from Gambier and resultant product obtained from the processing the Gambier cannot be marketed as Kattha. The aforementioned notification is only relevant as far as Kattha is concerned and exemption was granted to Kattha only. However, the product so obtained from the processing of Gambier along with some other raw materials does not fall within the ambit of Kattha as per clarification received from the Food & Adulteration Department and as well as on the basis of ISI specifications from Kattha.

Thus, the product so obtained from the processing of Gambier may rightly be classified in the CSH 3201 as Tanning Extract [on the basis of classification of Gambier in the Customs Tariff and as mentioned in corresponding Bill of Entry, so filed by the importers], and liable for payment of Central Excise Duty @ 16% adv.

On the basis of various records/information submitted/resumed from M/s. N.K. Laminates, M/s. Bij Kattha & M/s. Balram Wood Products, approximate duty involvement appears to be between Rs. 8-12 Cr. Exact quantum of duty cannot be ascertained at this stage as on account of Holi holidays, most of the manufacturers have not submitted the relevant records, which were not available on the date of search.

If approved, we may write a letter to DGCEI, submitting the details of intelligence to cover of the units of the same nature falling within the jurisdiction of other Commissionerates. Further, the remaining units falling within Kanpur Commissionerate, as verbally informed, may also be ordered to be searched in this regard.

Put up for perusal and further orders please.

