

(1994) 07 MAD CK 0067
In the Madras High Court
Case No : Writ Appeal No. 816/94

Ponds (India) Ltd.

APPELLANT

Vs

Assistant Collr. of C. Excise, Madras-V Division

RESPONDENT

Date of Decision : 21-07-1994

Acts Referred:

Central Excise Rules, 1944 — Rule 173C

Central Excises and Salt Act, 1944 — Section 11A, 11A(3)

Citation : (1994) 48 ECC 159 : (1994) 73 ELT 272

Hon'ble Judges : K.A. Swami, C.J.;Somasundaram, J

Bench : Division Bench

Advocate : Shri K. Parasaran, for the Appellant; Shri K. Jayachandran, Addl. C.G.S.C., for the Respondent

Judgement

In view of the above, I drop the proceedings initiated in this Office Show Cause Notice C. No. V/33/15/5/90-Cx.Adj./SCN No. 11/90 dated 25-9-1990".

Pursuant to the aforesaid order, the second show cause notice dated 30-12-1991 was issued. At the same time, the Department went up in appeal against the aforesaid order of the Collector of Central Excise before the Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi (For short, CEGAT). The appeal was filed at the instance of the Board. In the appeal (E/Appeal No. 2344/92-A), the CEGAT held as follows :

"The view expressed by the Bombay High Court has also been endorsed by the Supreme Court while disposing of the SLP against that decision wherein the Supreme Court has observed, "The material contained in the impugned notice could be used as independent material to support the final assessment, of course, after affording an opportunity to the respondents to meet the case.... This, the petitioners could do as part of the proceedings for assessment and as implicit in and incidental to it.... In effect, therefore, the Collector in his order has, rightly, in our view, held that it was for the Department to first finalise all the assessments in this case which were found to be only provisional and,

thereafter, only would come the stage of duty demand applying the relevant date for the purpose prescribed under Sec. 11A(3)(ii)(b) , Central Excises & Salt Act, 1944. The Collector's order on this aspect, therefore, needs no modification. As for the modality of finalising the assessments, it is to be noted that the Collector's direction to the Assistant Collector emerges from an adjudication order passed by him on a matter in which he has been specifically conferred with jurisdiction by the Board and flows from it and the rationale therefore being uniformity of approach, exhibiting equal anxiety on his part to safeguard revenue interest. At any rate, it is not an incurable situation, the Board being clothed with requisite powers under the Central Excise Rules. There is, thus, no reason to interfere with the Collector's order. The appeal is rejected."

Thereafter, the proceedings were continued on the basis of the show cause notice dated 30-12-1991. Therefore, the petitioner/appellant came up before this Court, challenging proceedings.

2.1 It is contended on behalf of the petitioner/appellant that the proceedings now continued do not conform to the order of the Collector which has been confirmed by the CEGAT, inasmuch as the assessment of all the units of the petitioner/appellant has to be taken up together and Section 11A is to be deleted from the show-cause notice; that assessment of all units to be made by one authority in order to avoid inconsistencies; that before the final assessment is made it is necessary to settle the price list and that the observations made in the opening para of the order of the learned single Judge are not warranted.

3. From the operative portions of the orders passed by the Collector and the CEGAT, which are extracted above, it is clear that the Adjudicating Authority is required to take up the final assessment of all the units of the petitioner/appellant together. Similarly, as pointed out by the CEGAT, invoking of Section 11A of the Act does not arise at this stage; as such, the Adjudicating Authority ought not to have persisted to avail Section 11A of the Act.

3.1 Before the final assessment is made, it is necessary as per Rule 173C of the Central Excise Rules, 1944, to settle the price list which is already submitted by the petitioner/appellant. The authority who has issued the show cause notice, unless he is authorised to make the final assessment of all the units of the petitioner, which are situated in the various places outside the jurisdiction of the Authority who has now undertaken the assessment proceedings, cannot make the assessment. The CEGAT in the operative portion of its order has observed that, if it is necessary, the Board can authorise the officer who has issued the show cause notice. The Board has now issued an order bearing No. 3/94-CY. 6 dated 13-7-1994, authorising the Assistant Collector of Central Excise, Madras-V Division, for the purpose of investigation and adjudication of the case pertaining to the show cause notice dated 30-12-1991 and subsequent notices dated 31-12-1993, 28-4-1994 and 1-6-1994 issued by the Assistant Collector of Central Excise, Madras V Division. As the show cause notices in question pertain to all the units of the petitioner/appellant the order of the Central Board of Excise

and Customs clearly authorises the Assistant Collector, Central Excise, Madras V Division, to make the adjudication. Thus one of the main contentions of the petitioner/appellant does not survive.

4. As far as the inclusion of Section 11A in the notices is concerned, the order of the Collector as well as the Central Board of Excise and Customs, has made it clear that Section 11A is not available and that proposition is supported by a decision of the Supreme Court as noticed by the CEGAT. Learned single Judge has stated that the application of section 11A of the Act would arise only after finalisation of the assessment. If that be so, the inclusion of section 11A in the show-cause notices become inappropriate as the present show cause notices are for final assessment. After the final assessment is made section 11A can be invoked only under the circumstances stated in that section and not otherwise. Therefore, we are of the view that the reference to section 11A in the show cause notice is inappropriate and impermissible. Hence, the same shall have to be deleted.

5. As per Rule 173C of the Rules, before the final assessment, the price list must be settled. Learned counsel appearing for the Department does not dispute this legal position as it is supported by Rule 173C of the Rules. Therefore, before taking up the adjudication, the Assistant Collector of Central Excise, Madras-V Division, has to settle the price list which is already submitted by the petitioner/appellant.

6. One more aspect of the matter which has to be considered is about the observations made in the opening paragraph of the order of the learned Single Judge which are as follows :-

"This writ petition illustrates as to how certain. V.I.P. companies are able to stall all assessment proceedings by approaching the courts at the stage of show cause notices and thus continue to enjoy the benefits of a provisional assessment wherein doubtful claims of abatements had been conceded. It may be, that when final assessments are made the party may get some benefits or lose the benefits obtained at the time of provisional assessment. I do not know why such companies should fight shy of final assessments on mere apprehension and surmises. That in this particular case a final assessment will involve payment of crores and crores of Rupees can easily be guessed from the manner in which the parties are dragging the proceedings from the date of a show cause notice dated 30-12-1991. I am inclined to say so much as a preface to my order, because of the untenable and inconsistent stands taken by the assessee at different stages."

We are of the view that in the facts and circumstances of the case, these observations are not warranted because, at every stage of the proceeding, the stand of the petitioner/appellant has been accepted by the concerned authorities. Therefore, it cannot be characterised that the petitioner/appellant is only interested in dragging on the proceedings in order to postpone the payment of duty. Hence, we are of the opinion, that those observations are to be deleted.

7. For the reasons stated above, the order of the learned single Judge dated 27-6-1994 passed in W.P. No. 10566/94 is modified and the writ appeal is disposed of in the following terms :

- i) Paragraph 1 of the order of the learned single Judge is deleted.
- ii) Reference to Section 11A in the show cause notice in question is also deleted.
- iii) The petitioner/appellant is granted four weeks from today to file reply to the show cause notice in question. The Adjudicating Authority shall complete the proceedings within four months from today.
- iv) After the reply is filed, the Assistant Collector of Central Excise, Madras-V Division, shall first hear the petitioner/appellant and settle the price list filed under Rule 137C of the Rules, and thereafter proceed to adjudicate in accordance with law.
- v) There will be no order as to costs.