(1990) 09 BOM CK 0053

In the Bombay High Court

Case No : Writ Petition No. 1628 of 1979

Pudumjee Pulp and Paper Mills Ltd. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 03-09-1990

Acts Referred:
Central Excise Rules, 1944 — Rule 8(1)

Citation : (1991) 51 ELT 235

Hon'ble Judges : M.L. Pendse, J;M.F. Saldhana, J

Bench : Division Bench

Judgement

Pendse, J.—The petitioner No. 1 is a joint stock company registered under the provision of the Companies Act and owns a factory situated at Theregaon in Pune District. The Company manufacturers various types of speciality papers including grease proof paper and glassine paper. The papers manufactured by the Company are liable for payment of excise duty under Tariff No. 17 and the Item reads as under :-

"17. Paper and paperboard all sorts (including paperboard, millboard, starboard, carboard and corrugated board) in or in relation to the manufacture of which any process is ordinarily carried on with the aid of power -

(1) Uncoated and coated printing and writing paper (other than poster paper) 25% ad valorem.

(2) Paper board and all other kinds of paper including paper of paper boards which have been subjected to various treatments such as coating, impregnating, corrugation, creping and design printing not else where specified. 40% ad valorem."

2. In exercise of powers conferred by sub-rule (1) of Rule 8 of the Central Excise Rules, 1944 the Central Government published Notification No. 42/73-CE dated March 1, 1973 providing that in respect of paper all sorts, other than newsprint and all varieties of board, falling under Item No. 17 of the First Schedule to the

Central Excises and Salt Act, 1944 and containing not less than 40 per cent. by weight of bagasse, jute stalks or cereal straw in the form of pulp, the duty of excise leviable thereon shall be reduced by an amount as is equivalent to the amount of the duty calculated at the rate of 9 paise per kilogram. In view of this exemption notification, the Company was entitled to advantage in payment of excise duty in respect of manufacture of grease proof paper and glassine paper.

On June 16, 1976, the Central Government in exercise of powers conferred by sub-rule (1) of Rule 8 of the Central Excise Rules published Notification No. 198 of 1976 exempting the excisable goods of the description specified in column (3) of the Table annexed to the notification, when cleared from one or more factories in excess of the base clearances by or on behalf of a manufacturer, from so much of the duty of excise leviable thereon, as is in excess of seventy-five per cent. of such duty. The exemption was available on certain conditions but it is not necessary to refer to those conditions for the purpose of this petition. The Table annexed to the notification sets out 43 items of goods but does not include ''paper''.

On July 24, 1976, the Government of India published another notification and included two more items in the Table annexed to Notification No. 198 of 1976. Item No. 44 covered printing and writing paper other than poster paper, while Item No. 45 covered paper boards and all paper (other than those specified in Item No. 44). The exemption available under Notification No. 198 of 1976 and Notification No. 216 of 1976 was available only when the manufacturer clears from one or more factories the goods in excess of base clearances.

3. The Exemption Notification No. 42/73 was replaced by Exemption Notification No. 129/77 dated June 18, 1977. By Notification No. 129/77, the Government of India exempted paper other than paper boards, cigarette tissue, glassine paper, grease proof paper, coated paper and paper of substance not exceeding 25 grams per square meter from so much of the excise leviable as in excess of sixty-six and two third per cent. of the duty leviable. The result of publication of Exemption Notification No. 129/77 was that the exemption available to the Company under Exemption Notification No. 42/73 was no longer available. The Company was not entitled to take advantage of Exemption Notification No. 129/77 because the exemption was not available in respect of manufacture of glassine paper and and grease proof paper. As the Company was not entitled to advantage of Exemption Notification No. 129/77, the petitioners could avail of the exemption prescribed under Notification No. 198/76 with Notification No. 216/76 provided the requirement of those notifications were complied with, the principle being that the clearance from the factory of grease proof paper and glassine paper was in excess of the base clearances. The Company satisfied those conditions with effect from September 30, 1977 and demanded incentive rebate available under Notification No. 198/76 and Notification No. 216/76 in respect of manufacture of grease proof and glassine paper. The Assistant Collector, Central Excise, granted the rebate claimed by order dated December

22, 1977 and January 21, 1978, with the result that the Company paid the excise duty at concessional rate with effect from December 25, 1977.

The Company then sought refund in respect of higher duty paid from September 30, 1977 onwards and ending with December 25, 1977 from the duty was paid at concessional rate. The Asst. Collector of Central Excise granted the refund as claimed by the petitioner Company, by two orders dated April 17, 1978 and May 31, 1978.

4. On August 29, 1978, the Assistant Collector, Central Excise, Pune Division, served show cause upon the petitioners to explain why the refund granted should not be recovered as the order of refund was irregular. The Company was also served with three other show cause notices dated August 29, 1978, January 25, 1979 and May 20, 1979 demanding duty which, according to the Assistant Collector escaped payment on a wrong assumption that the Company was entitled to the advantage of exemption under Notification No. 198/76 and Notification No. 216/76. The Company made representation to the Government of India against the issuance of the show cause notice but the representation was turned down by order dated July 4, 1979 and that gave rise to the filing of the present petition under Article 226 of the Constitution of India. It is required to be stated at this juncture that the advantage of Exemption Notification Nos. 198/76 and 216/76 was available only upto end of March 1979.

5. Shri Nariman, learned Counsel appearing on behalf of the petitioners, submitted that the show cause notices were issued by the Assistance Collector, Central Excise, Pune, on the strength of trade notice, copy of which is annexed as Exhibit ''L'' to the found that the manufacture of grease proof and glassine paper was entitled to exemption from payment of excise duty in accordance with Notification Nos. 198/76 and 216/76 and, thereupon directed refund of excise duty between September 30, 1977 and December 25, 1977. Indeed, the Assistant Collector accepted the claim and the clearance was permitted on payment of duty in accordance with notifications from December 25, 1977 onwards. The learned counsel urged that there is a change of view on the part of the Assistant Collector only because of the trade notice. The learned counsel also submitted that it is obvious from mere perusal of the notifications that the Company is entitled to the clearance in excess of base clearances was satisfied. We find considerable merit in the submission of the learned counsel.

As mentioned hereinabove, the petitioners were paying excise duty on the manufacture of grease proof and glassine paper by seeking advantage of exemption prescribed under Notification No. 42/73 dated March 1, 1973. Notification No. 216/76 dated July 24, 1976 entitled the Company to claim exemption provided the requirement that the Company should clear the manufactured goods in excess of base clearance was satisfied. The Company could not have availed of the benefit of Notification No. 216/76 as long as the benefit of Notification No. 42/73 was availed of Notification No. 216/76 clearly provided that the advantage of exemption under that Notification is permissible, provided manufacturer is not seeking advantage from payment of excise duty under any other notification. The advantage of exemption available under Notification No. 42/73 ceased to be available with effect from June 18, 1977 because Notification No. 42/73 was replaced by Notification No. 129/77. Notification No. 129/77 specifically excluded advantage to the manufactures of grease proof and glassine paper, with the result that from June 18, 1977, the Company was not entitled to exemption both under Notification No. 42/73 which was repealed and Notification No. 129/77 which did not exemption grease proof paper and glassine paper. As a result of publication of Notification No. 129/77, the Company could claim benefit under Notification No. 216/76 provided the conditions of that notification were complied with. The conditions were complied with only with effect from September 30, 1977 and thereupon the Company could not be denied advantage of exemption under Notification No. 216/76. The Assistant Collector, therefore, rightly directed that duty should be paid at concessional rate from September 30, 1977 and indeed the duty was paid at concessional rate from December 25, 1977. The Company was also granted refund for the period between September 30, 1977 and December 25, 1977 in respect of excess duty paid.

6. The Assistant Collector issued the impugned show cause notice merely because of a trade notice issued by the Government of India. The trade notice pose the following question :-

"Whether a manufacturer of paper availing of the concession under Notification No. 138/77 in respect of some of the varieties of paper manufactured by him, can also simultaneously get the benefit of concession under Notification No. 198/76 in respect of certain other varieties of paper produced by him for which he does get the exemption under Notification No. 128/77, or not ?"

The question was answered in the negative by stating that the manufacturer of paper and paper board who avails of the concession under Notification No. 128 and 129/77 is debarred from availing of the benefit under Notification No. 198 and 216/76 even in respect of varieties of paper for which does not get the exemption under Notification No. 128 and 129/77. It is now well settled that the directions under trade notices are not binding upon the Assistant Collector while exercising quasi-judicial powers under the provisions of the Act. Though the show cause notices do not specifically refer to the trade notice, it is obvious that the Assistant Collector was prompted to issue show cause notice under the advise of trade notice. In our judgment, the advise given by the direction of trade notice is clearly erroneous. From the examination of the Notifications referred to above, it is crystal clear that the Company is entitled to advantage of Notification No. 198 and 216/76 from September 30, 1977. Once the Company was deprived of advantage of Notification Nos. 42/73 and 129/77, then the Company cannot be denied the advantage of exemption Notification No. 216/76. In our judgment, the entire basis of issuance of show cause notice for recovery of refund of duty already paid and demanding the duty on the ground of escarpment because of the Company availing exemption is entirely faulty and without jurisdiction. Consequently, the notices are required to be struck down. Shri Desai, learned counsel appearing for the Department, made a faint attempt to urge that the refund was secured even in respect of period when the Company had taken advantages of exemption available under Notification No. 42/73. The submission is entirely incorrect. While seeking refund, the Company had specifically excluded clearance for which exemption was valid of under Notification No. 42/73. The Company was entitled to advantage of Notification No. 42/73 till it was superseded by Notification No. 129/77. The petitioners sought refund of duty only when the advantage of exemption Notification No. 216/76 was available with effect from September 30, 1977. In our judgment, all the four shows cause notices, in these circumstances, cannot be sustained and are required to be quashed.

7. Accordingly, petition succeeds and show cause notice dated August 29, 1978 demanding back the refund paid and three show cause notices dated August 29, 1978, January 25, 1979 and July 3, 1979 are quashed. In the circumstances of the case, there will be no order as to costs.