

(1979) 08 AP CK 0001

In the Andhra Pradesh High Court

Case No : Writ Petition No's. 419, 445 and 446 of 1978

Rajasthan Tobacco Co. by Sole Proprietor

APPELLANT

Vs

Assistant Collector of Central Excise

RESPONDENT

Date of Decision : 09-08-1979

Acts Referred:

Central Excise Rules, 1944 — Rule 171, 32(1), 40
Central Excises and Salt Act, 1944 — Section 40, 40(2)

Citation : (1979) 4 ELT 636

Hon'ble Judges : P.A. Choudary, J

Bench : Single Bench

Final Decision : Allowed

Judgement

P.A. Choudary, J.—This is a writ petition to quash the show cause notice issued by the Central Excise Integrated Divisional Office, Vijayawada dated 28-1-1974, calling upon the petitioner to show cause to the Assistant Collector, Central Excise, Vijayawada, why a duty of Rs. 1,03,205.52Ps. on 52,124 Kg. of I.A.C. tobacco bits and midribs should not be demanded from the petitioner under Rule 40 of the Central Excise Rules, 1944. The case of the respondent, as set out in the show cause notice, is that the petitioner-Company, which has its godown at Koppuravur, obtained the secondary T P. Is from the inspector of Central Excise, Kondapalli fixed sector of Kan-chikacherla MOR for the removal of 52,124 Kgs. of I.A.C. tobacco bits and midribs from the premises of Sri P. Venkaiah, L. 2 licence holder of Kondapalli fixed sector, that the Assistant Collector, Central Excise, Vijayawada, visited the premises of P. Venkaiah for the purpose of investigation and found that P. Venkaiah was a fictitious name and he did not really exist and it was also found by the Assistant Collector that no duty was paid on the quantity of 52,124 Kgs. of I.A.C. tobacco bits and midribs removed from the premises of P. Venkaiah of Kondapalli to the godown of the petitioner-Company at Koppuravur.

2. On the basis of the aforesaid facts, it was alleged that there was a contravention of Rule 40 of the Central Excise Rules, presumably committed by

the petitioner. In support of this case, the respondent-Collector of Central Excise, had filed counter affidavit wherein he stated --

"It was claimed by the petitioner that he received the tobacco in question from the shop of one Sri P. Venkaiah, a holder of L. 2 licence No 1289/66, Kondapalli. Since the origin of tobacco covered by the 13 transport permits in from TPI could not be traced back to licit means with reference to parent documents (documents showing the primary transport of tobacco on payment of excise duty) quoted thereon and the parent documents were found to be bogus, a demand notice DD 2 No. 309507, dated 30-5-1968 for Rs. 1,03,205.52 being the duty on 52,124, Kgs. of I A.C. bits and midribs was issued by the Inspector, Kondapalli fixed" sector in Kanchikacherla M.O.R. to the petitioner firm."

3. The question in this Writ Petition is rather simple. The question is whether the respondent has the authority to issue the show cause notice ?

The only section of the law which the respondent referees to is Rule 40 and its contravention. Rule 40 of the Central Excise Rules reads as follows :

"40. Wholesale purchaser may not receive unmanufactured tobacco or other unmanufactured products except under permit showing payment of duty. -- Except as provided in the proviso Sub-rule (1) of Rule 32 and in Rule 171 no wholesale purchase of unmanufactured tobacco for the purpose of trade or manufacture and no wholesale purchaser of other unmanufactured products from a curer shall receive to any part of his premises or into his custody or possession, any unmanufactured products imported from a foreign country, otherwise than under a valid permit granted by an officer showing that the proper duty has been paid or under any other valid transport document recognised by the Central Government in lieu thereof which shall also show that the proper duty has been paid and every such wholesale purchaser who receives or has in his custody or possession any such goods in contravention of this rule, shall, in respect of every such offence, be liable to pay the duty leviable on such goods, and to a penalty which may extend to two thousand rupees, and the goods shall also be liable to confiscation."

4. A perusal of Rule 40 clearly shows that its contravention can take place only when the petitioner was alleged to have received the tobacco on which duty has not been paid and no document recognised by the Central Government shows that duty has been paid. In this case the petitioner has alleged that he had purchased the tobacco brought to him under T.P Is. If the petitioner had purchased the tobacco brought to his godown on being satisfied that duty has been paid on that tobacco as evidenced by the recitals in T.P. 1, the petitioner cannot be said to have contravened Rule 40. It has been nowhere stated in the show cause notice that the TP. 1s, on the basis of which tobacco has been transported to the petitioner's godown were not issued by the Department, although in the show cause notice it was stated that T.P. Is had been obtained by the petitioner-Company itself. In the counter the respondent had abandoned his

case. In fact the T.P. 1s could not be obtained by the petitioner-company within the jurisdiction of Kanchikacherla range for transporting tobacco from the range of Kondapalli. The statement found in para 4 of the counter affidavit "that on enquiry it was also found that no person by name P. Venkaiah really existed, that no tobacco was ever brought that the tobacco received from the petitioner firm should be construed in the circumstances as non-duty paid" would also clearly go to show that the petitioner's allegation was that the T.P. 1s were obtained in the name of P. Venkaiah, who is wholly a different person from the petitioner. In these circumstances and in the absence of a clear statement either in the show cause notice or in the counter affidavit that T.P. 1s have not been issued by the Excise authorities, I hold that the issuance of this show cause notice is without jurisdiction.

5. Sri Mangachary the learned counsel for the petitioner relied upon an assertion that the show cause notice is barred by limitation u/s 40 Clause (2) of the Central Excise Act. No suit, prosecution or other legal proceeding shall be instituted for anything done or ordered to be done under this Act after the expiration of six months from the accrual of cause of action or from the date of the act or order complained of. In this case even if one accepts the contention of the respondent, it would amount to the petitioner receiving unmanufactured tobacco under a bogus T.P. 1 without the tobacco earlier suffering the payment and duty. The petitioner would, therefore be liable for the payment of the duty, the amount he receives the tobacco on which earlier no duty had been imposed. In other words, the petitioner would be liable to pay the duty in the year 1968. In as much as Section 40 Clause (2) of the Central Excises and Salt Act, fixes a limitation of six months and the judgment of the Supreme Court in *Public Prosecutor, Madras Vs. R. Raju and Another, etc.*, had construed that Section 40(2) applies as a protection not only in favour of the Department but also from the actions of Department, the present show cause notice must be clearly held to be barred. But, it was argued by the learned Central Government Pleader that the bar of Section 40 Clause,(2) would not-apply to judicial or quasi-judicial proceedings. I cannot agree. The issuance of a show cause notice can certainly be described as a legal proceeding instituted for anything done under this Act. The thing alleged to have been done by the petitioner is failure to pay the duty and now for that failure the show cause notice, which is a legal proceeding is issued. Section 40(2) says that such a legal proceeding shall not be instituted after the expiration of six months from the accrual of cause of action. There is nothing in Section 40(2) which says that bar cannot be applied to either judicial or quasi-judicial proceedings. In fact the law of limitation is more appropriately applied to such proceedings. In a Bench decision of this Court in W.P. No. 2516/74, arising u/s 40 Clause (2) of the Central Excise Act, similar point has been urged on behalf of the Central Government and was negatived. On this ground also I am constrained to hold that the show cause notice is issued without jurisdiction. The Bench has held that "no suit, prosecution or other legal proceeding shall be instituted in respect of evasion of a tax after the period of six

months". I, therefore, cannot agree with this contention.

6. It is also argued that Section 40 Clause (2) has been amended in the year 1973. But, that amendment which would only govern events that had taken place subsequent to its coming into force does not help the respondents. It will have no impact on transactions, which are barred by time under the law, then existing.

7. It appears to me that the Central Government had been robbed of a huge amount of Rs. 1,08,208.52 Ps. due to failure of the department to take timely action. When T.P. 1s were issued by the department, it is part of the duty of the authorities to verify whether P. Venkaiah was a mere name lender and a bogus person or not and whether the tobacco, which is sought to be transported on such T.P. 1s has already suffered the payment of duty. Obviously that has not been done in this case. It if has been checked up at that stage, T.P. 1 would not have been issued at all. I feel that some one in the department is remiss of his duty. I, therefore, direct that a proper enquiry should be held and responsibility should be fixed, for this act of remiss, A copy of this judgment should be sent to the Central Board of Revenue, New Delhi.

8. The learned counsel for the respondent states that there is an alternative remedy by way of appeal. In view of the fact that I am holding that there is no jurisdiction in the respondent to issue this notice, I cannot agree with this contention.

9. W. Ps. 445 and 446 of 1978 are similar writs.

10. The Writ Petitions are accordingly allowed with costs. Advocate's fee Rs. 150/- in each.