
(1986) 12 BOM CK 0010

In the Bombay High Court

Case No : Writ Petition No. 2840 of 1986

Raman Kantilal Bhandari

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 18-12-1986

Acts Referred:

Customs Act, 1962 — Section 27(1)
Customs Tariff Act, 1975 — Section 3

Citation : (1987) 11 ECC 181 : (1987) 11 ECR 84 : (1987) 27 ELT 617

Hon'ble Judges : M.L. Pendse, J

Bench : Single Bench

Judgement

1. The petitioner is a sole proprietor of the firm Mona Enterprises and imports various types of alcohols. In August 1984 the petitioner imported a consignment of pentaerythritol and on import bills of entry were filed declaring the imported goods to fall under Customs Tariff Item 29, 29.01/45, and for the purpose of countervailing/additional duty under Tariff Item No. 68. The tariff rate of customs duty prescribed is 70% in addition to the 40% Auxiliary duty plus 10% additional duty. The bills of entry were duly passed and the petitioner paid duty on November 24, 1984. The petitioner claims that subsequently he became aware that as the goods imported were alcohol, the countervailing/additional duty was not payable in accordance with Tariff Item 68(a). The petitioner accordingly filed a refund application on August 5, 1986 seeking refund of an amount of Rs. 15,688.94. By order dated September 26, 1986 the Assistant Collector of Customs, Refund Department, rejected the claim on the ground that the same is barred by limitation u/s 27(1) of the Customs Act. The order passed by the Assistant Collector has given rise to filing of this petition on October 22, 1986 under Article 226 of the Constitution of India. The relief sought by the petitioner is a declaration that Section 27 of the Customs Act, 1962 is unconstitutional, illegal, null and void and for getting aside the order passed by the Assistant Collector and for refund of the duty along with interest at the rate of 18% per annum.

2. Shri Kantawala, learned counsel appearing on behalf of the petitioner, did not advance any submission in respect of prayer for declaration that Section 27 of the Customs Act is unconstitutional. The learned counsel restricted his submissions to the claim that the impugned order of the Assistant Collector is contrary to law and the petitioner is entitled to seek refund of the amount claimed. It was urged by the learned counsel that additional duty at the rate of 10% ad valorem was charged u/s 3 of the Customs Tariff Act and the said recovery was clearly illegal as the goods imported are not chargeable to duty, being under ambit of Tariff Item 68. The learned counsel further urged that the Customs Excise and Gold (Control) Appellate Tribunal held on April 19, 1983 that Tariff Item 68 refers to "alcohol all sorts" and all types of alcohol, the chemical description of which is clear, are excluded from the purview of Item 68, and therefore, do not attract countervailing duty on import. Shri Kantawala submitted that the decision recorded by the Tribunal was not only not challenged by the Department but was specifically accepted and that fact is reflected in the copy of the Circular dated October 1, 1984 issued by the Central Board of Excise and Customs, New Delhi. The learned counsel also contended that the Assistant Collector committed an error in holding that the refund claim was barred by limitation u/s 27(1) of the Customs Act when the duty was recovered and paid by the petitioner under mistake of law. Shri Kantawala highlighted the fact that the Assistant Collector has passed refund orders in respect of identical item imported by the petitioner in a case where the claim was not turned down on the ground of limitation.

Shri Sethna, learned counsel appearing on behalf of the Department, resisted the relief sought by contending that the petitioner has efficacious alternate remedy of filing an appeal against the order of the Assistant Collector, and therefore, the Writ Petition should not be entertained. Shri Sethna also contended that the finding of the Assistant Collector that the refund claim is barred by limitation is correct and in any event even assuming that the petitioner can claim that the duty was paid under mistake of law, and therefore, the writ petition could be filed within three years from the date of knowledge of the mistake, still the present petition should not be entertained as the petitioner has not explained the delay in filing the petition after being aware of the mistake. Shri Sethna further contended that whatever might have been decided by the Tribunal and whatever decision might have been taken by the Central Board of Excise by issuing circular, the correct position about the ambit of Tariff Item No. 68(a) is that it restricts itself only to Ethyl Alcohol and not "alcohol all sorts". It was further submitted that as the imported item is not Ethyl Alcohol, the exclusion claimed under Tariff Item 68(a) is not available. The learned counsel finally submitted that even if the Central Excise duty is not payable, additional duty of customs can still be levied.

3. Before examining the claim of the petitioner on merits, it is necessary to deal with the preliminary objection of Shri Sethna that the petition should not be entertained as the petitioner has alternate efficacious remedy. It was urged that

the impugned order passed by the Assistant Collector is appellable and therefore the writ petition should not be entertained. The submission has no merit on the facts and circumstances of the case. The refund application has been rejected on the ground that it was filed six months from the date of payment of duty, and therefore, cannot be entertained u/s 27(1) of the Customs Act. It is now well settled that the Customs authorities while determining the refund application are regulated by the provisions of the Customs Act, but in case the duty is paid by the importer under mistake of law, then the period of limitation set out u/s 27(1) of the Act would not be attracted. In these circumstances no worthwhile purpose would be served by driving the petitioner to file an appeal before the Collector. Shri Sethna urged that the question as to whether the item imported by the petitioner is "alcohol" or "organic chemical compound and therefore not an alcohol" and would not attract tariff Item 68(a) requires to be determined on the material that would be led by the Department, and therefore, the question must be left for determination of the Appellate Authority. I inquired from Shri Sethna as to whether the Department desires to produce any material in addition to the affidavits filed in the present petition, and Shri Sethna very fairly stated that there is no other material available. The present petition is lodged on October 8, 1986 and was exhaustively argued before me for a considerable period. In these circumstances no valid purpose would be served by driving the petitioner to appellate authority, because such procedure would lead to multiplicity of litigation. Accordingly, the preliminary objection of Shri Sethna is rejected.

4. Shri Sethna then urged that though it is true that the person who paid the duty under mistake of law can file an application seeking refund within a period of three years from the date of knowledge of the mistake, still the relief should not be granted to the petitioner in the present case. It is now well settled that duty paid under mistake of law is duty recovered without authority of law and jurisdiction and the claim of refund in such cases is not governed by law of limitation set out under the Customs Act. A reference can be usefully made in this connection to the decision of the Supreme Court reported in 1978 ELT (J154) , Shalimar Textile Mfg. Pvt. Limited Vs. Union of India and others, , Shalimar Textile Mfg. Pvt. Limited Vs. Union of India and others, and International Electronics Mfg. Co. and others Vs. Union of India and others, In view of these decisions, Shri Sethna very rightly did not dispute that if the duty is paid under mistake of law and if the petition is filed within a period of three years from the date of knowledge of such mistake, then the claim for refund cannot be declined on the ground of limitation prescribed u/s 27(1) of the Act. Shri Sethna contended that the decision was recorded by the Tribunal on April 19, 1983 and the Central Board of Excise issued the circular on October 1, 1984, and therefore, it must be presumed that the petitioner had knowledge of the correct position of law, but inspite of that the petitioner paid the duty on November 24, 1984 and did not bother to file a refund application till August 5, 1986. This conduct, says Shri Sethna, clearly indicates that the petitioner is guilty of serious laches and therefore the petition should not be entertained.

Indeed, Shri Sethna doubted the claim of the petitioner that he was not aware of the correct position of law at the time of paying the duty. The submission of the learned counsel overlooks that if there is a presumption that the petitioner should know the correct position of law when decision was recorded by the Tribunal and Circular was issued by the Central Board of Excise, then there is a greater presumption to hold that the Department and the officers of the Collectorate very well knew the exact position of law and should not have recovered the duty from the petitioner. It is easy to suggest that the petitioner should know the law but the Department may ignore it and/or inspite of knowledge that duty is not recoverable the officers of the Collectorate will recover the duty merely because the tax payer did not know the correct position. If the Central Board of Excise has advised all the Collectorates that duty was not payable then it is difficult to appreciate why duty was recovered from the petitioner. Shri Sethna, realising the difficulty in advancing the submission, contended that in any event the petitioner has not explained why refund application was not filed for about two years. According to Shri Sethna, the failure to explain this period is itself enough to refuse the relief sought in the present petition. I am not prepared to accept the submission of Shri Sethna because if the duty recovered is without any authority of law, then the mere fact that the petitioner did not take steps forthwith is not enough for the Department to claim that such duty will be retained and relief should be refused. Reliance in this connection on the decision of the Supreme Court reported in 1986 (25) E.L.T. 867, Commissioner of Sales Tax, U.P. v. Auriaya Chamber of Commerce, Allahabad, by the learned counsel for the petitioner is very appropriate.

5. Shri Sethna then submitted that even assuming that the claim for refund is in time, the petitioner is not entitled to relief as the import falls within Tariff Item 68 and not under exclusion prescribed under Tariff Item 68(a). Shri Sethna urges that the ambit of Item 68(a) is very narrow and restricts only to Ethyl Alcohol and imported item not being Ethyl Alcohol the petitioner was liable to pay duty. The relevant portion of Tariff Item 68 reads as under :

"68. All other goods not elsewhere Eight per cent specified, excluding - ad valorem (a) alcohol, all sorts, including alcoholic liquors for human consumption".

The plain reading of this Tariff Item 68 indicates that is a residuary item covering all imported goods not elsewhere specified. Item 68(a) carves out an exception and prescribes that alcohol of all sorts, including alcoholic liquors for human consumption are not liable to duty prescribed under Item 68. Shri Sethna did not dispute that the item imported by the petitioner falls under generic term "alcohol", but urged that Item 68(a) does not cover all alcohol, but is restricted only to Ethyl alcohol. In support of the submission strong reliance is placed on the affidavit of M.K. Ranganathan, Deputy Chief Chemist, Customs, Bombay sworn on December 16, 1986. In paragraph 5 of the affidavit it is claimed that the term "alcohol" derives from "al" and "kohl" which are two Arabic words, and

when unqualified becomes specific for ethyl alcohol. It is further claimed that ethyl alcohol is well known as a constituent of alcoholic beverages. Shri Ranganathan stated that alcohols other than ethyl alcohol may be injurious to health like methanol propenol and other higher alcohols not dilatable with water. Ethyl alcohol, according to Shri Ranganathan, has a structure $\text{CH}_3\text{CH}_2\text{OH}$ and Ethyl alcohol is a primary alcohol and contains only one alcoholic or OH group. The deponent further stated that the expression "alcohol" given in the relevant technical books is used to refer to ethyl alcohol of all sorts. Reference is then made to a book by Riedel-de-Heren by name "Laboratory Chemicals 1984", and it is claimed that this publication has the merit of combining technical understanding as well as the trade and commercial understanding for the products enumerated therein. Shri Ranganathan has given the properties of ethanol, glycol phenol and pentaerythritol, and after referring to certain publication, all of which were not available for my perusal, claims that in trade parlance the term "alcohol" unqualified and in singular refers to ethanol or ethyl alcohol. The deponent further claims that the qualification "all sorts" had to cover denatured spirit, ammoniated spirit, rectified spirit, denatured spirit, absolute alcohol and alcohol of various dilutions and preparations. The deponent also claims that the item imported by the petitioner is never sold as an alcohol and is also not known as alcohol. Relying on this affidavit Shri Sethna claims that the Tariff Item 68(a) should be restricted only to ethyl alcohol. It is impossible to accede to the submission of the learned counsel. It is first instance, the plain words of tariff item leaves no manner of doubt that the exclusion is to "alcohol of all sorts" and it would be doing violence to the plain language to accept the submission of Shri Sethna that alcohol all sorts should be limited only to ethyl alcohol. Shri Sethna had to concede that the expression "alcohol" is a generic term, while "ethyl alcohol" is only one of the species. In fact Shri Ranganathan in paragraph 5 of the affidavit had also pointed out that there are other alcohols than ethyl alcohol, but they may be injurious to health. It hardly requires to be stated that in a taxing statute when the words are clear and specific, it is not permissible for the taxing authority to limit the scope of the entry to bring into the net more items for the purpose of taxation. In fact even if there is nay ambiguity in a taxing statute, it is well stated that same should be resolved in favour of a tax payer. In the present case there is no ambiguity whatsoever and the only meaning to be attached to Item 68(a) is that it will cover every kind of alcohol. The submission that words "all sorts" in the item are redundant and the entry refers only to that alcohol which is used for human consumption cannot be accepted.

Apart from the plain meaning of Tariff Item 68(a) there are other telltale circumstances to indicate that the contention now tried to be raised is clearly an after thought and is exactly contrary to the decision recorded by the Tribunal in April 1983 and which was accepted by the Central Board of Excise in October 1984. A copy of the decision of the Tribunal is annexed as Exhibit "D" to the petition, and perusal of the same indicates that the Tribunal was entertaining a

revision application which was initially filed before the Government of India u/s 131 of the Customs Act. The applicant before the Tribunal were manufacturers of Amyl alcohol in their factory at Calcutta and had imported 68 drums of ISO Amyl Alcohol, which was charged to Customs Duty, auxiliary duty plus countervailing duty under Tariff Item 68. The levy of countervailing duty was challenged on the ground that Clause (a) of Item 68 excludes "alcohol all sorts". The objection was overruled by the Assistant Collector and the Collector in Appeal. The Tribunal held that Item 68 mentions "alcohol all sorts" including alcoholic liquors for human consumption and it is clear that all types of alcohol, the chemical description of which is certain, are excluded from the purview of Item 68 and therefore do not attract countervailing duty. The Tribunal felt that importance must be given to the fact that definition of alcohol given in Items 14(e) and 14(f) of the Central Excise Tariff has been made applicable to Item 68. In view of these findings the Tribunal accepted the objection raised by the importer. The Department did not challenge the correctness of the decision and it has become final, but that is not the only reason why the Department should not reagitate the issue. After the decision of the Tribunal than Central Board of Excise and Customs issued a circular dated October 1, 1984 addressed to all the Collectorates of Customs, and the subject was "the scope of the term "alcohol - all sorts" appearing under Tariff item 68". The Circular, copy of which is annexed as Exhibit "A" to the petition, recites that doubt has been raised as to whether "alcohol, all sorts" includes all varieties of alcohol or only ethyl alcohol of various purities/grades. The Circular states that the point was discussed after consulting the Chief Chemist as well as on the basis of tariff Conference and the fact that Tariff Item excludes all kinds of alcohol including ethyl alcohol, methyl alcohol, benzyl alcohol etc. The Madras Collectorate was of the opinion that the entry covers only ethyl alcohol. The Circular recites that the matter was further examined and it was decided that though Central Government is not competent to levy duties only on alcoholic liquor for human consumption, since the imposition of such levy even though nominal, will have the effect of taking away the savings provision under Article 277 of the Constitution, rendering all levies illegal on such alcohol, it is desirable that duty may not be levied on the alcohol other than for human consumption also. The Circular further states that a conscious decision was taken that in addition to alcohol for human consumption other sorts of alcohols would also not be excisable under Tariff Item 68. The Law Ministry also concurred with the view and the decision recorded by CEGAT was accepted by the Board. It is, therefore, obvious that the Department not only accepted the decision recorded by the Tribunal by also further directed all the collectorates not to recover the duty on alcohols all sorts and the claim that Item 68(a) is restricted to only ethyl alcohol was not accepted.

In spite of this decision taken by the Board, Shri Sethna vehemently submitted that the decision of the CEGAT is not binding on this Court and it is open of him to contend that the decision recorded by the Central Board of Excise is incorrect. Though I am not impressed by the submission of the learned counsel, I

permitted Shri Sethna to establish that Item 68(a) is restricted only to ethyl alcohol. As mentioned hereinabove the principal reliance was on the affidavit sworn by Shri Ranganathan and I must confess, that in my judgment, the affidavit does not support the claim made by Shri Sethna.

6. Apart from the affidavit of Shri Ranganathan, reliance was placed on the affidavit of Shri Ranbir Singh, Appraising Officer in "C" Group, Bombay Customs and sworn on December 16, 1986. The deponent claims in paragraph 3 of this affidavit that on November 8, 1986 at about 6.30 P.M. the deponent visited M/s. Good Luck Wine Store situated at Crawford Market, Bombay and the deponent asked the proprietor of the wine shop as to whether pentaerythritol, which is the item imported by the petitioner was available in wine shop. The deponent claims that the proprietor was surprised at the demand and conveyed that his shop deals only with alcoholic products like whisky, brandy, gin rum etc. Reliance is placed on the affidavit of Shri Singh to urge that the product imported by the petitioner is not known as alcohol in the trade circle. It is difficult to appreciate how such a submission can be advanced on the basis of the affidavit of Ranbir Singh. The deponent has put it very mildly by stating that the proprietor was surprised, because I thought that if one goes to the wine shop and ask for pentaerythritol the proprietor would not be merely surprised but would think something else about the inquirer. It is impossible even to imagine how an argument can be advanced that the item imported is not alcohol because the same is not sold across the counter in a wine shop. Another affidavit sworn on December 16, 1986 by Shri Jagdish Chander, Assistant Collector of Customs, Bombay is relied upon to claim that the item imported by the petitioner is available in a shop dealing in chemicals. In paragraph 4 of this affidavit, the deponent claims that he went to a dealer having establishment in chemical market situate at Vadgadi and inquired whether pentaerythritol is available and received an affirmative reply. Shri Sethna claims that from this affidavit I must conclude that item imported is a chemical product and not an alcohol. It is impossible to accede to the submission of the learned counsel. It is difficult to hold from these two affidavits or from the affidavit of Shri Ranganathan that in trade circles the expression "alcohol" means or is equated only with ethyl alcohol. To reiterate, Shri Sethna did not dispute that the imported item falls under generic term "alcohol".

There is some more vague material to which reference was made by Shri Sethna in support of his submission and it is desirable to make a brief reference to the same. Deputy Collector of Customs Pundir filed an affidavit dated December 4, 1986 in answer to the petition and to this affidavit is annexed a price list of S.H. Kelkar & Co. Ltd. in respect of various items of Aroma Chemicals, including items like Benzyl Alcohol Extra, Phenyl Ethyl Alcohol Extra etc. The terms and conditions are annexed to the price list and it inter alia recites that all the products mentioned in the price lists are free from alcohol. Shri Sethna takes recourse to this price list to urge that even when the item is described as "alcohol extra" still it does not contain any alcohol and therefore, the Tariff Item

68(a) should be read as restricted only to ethyl alcohol. I must confess my inability to understand any merit in the submission. Reliance is then placed on two certificates dated November 10, 1986 issued by Dr. Gopakumar G. Nair in his individual capacity as Director of Bombay Drug House Pvt. Ltd. and as the Chairman of Bulk Drug Committee. The certificates recite that according to the best knowledge of Dr. Nair in the alcohol-based industry and trades only ethyl alcohol is known and referred to as alcohol and other items like Glycol, Ethylene Glycol, Propylene Glycol etc. even though chemically referred to as alcohol, because of the OH group in the chemical structure, in commercial parlance only ethyl alcohol is known as alcohol. Shri Sethna submits that Dr. Nair's certificate is more than enough to conclude that in trade circles only ethyl alcohol is known as alcohol. The submission is entirely devoid of merit. In the first instance I am not prepared to place any reliance on the certificate issued by Dr. Nair in November 1986, when the petition was on Board for hearing. Secondly, the certificates are diametrically contrary to the decision recorded by the Assistant Collector, Central Excise, Thane on November 29, 1984 in the case of M/s. National Organic Chemicals Industries Ltd., copy of which is annexed as Exhibit "G" to the petition, wherein it was held that the products viz. (1) Diketone Alcohol (also known as DAA Diacetone), (2) Ethyl Hexyl Alcohol (also known as 2 EHA Ethyl Hexanol and 2EH), (3) Isobutyl alcohol (also known as IBA, Isobutanol) (4) Isopropyl Alcohol (also known as IPA, Isopropanol) (5) Methyl Amyl Alcohol (also known as Methyl Isobutyl Carbinol MIBC) and (6) Normal Butyl Alcohol (also known as NBA, Normal Butanol and N-Butanol) to be not falling within the ambit of T.I. No. 68 of C.E.T. i.e. as non-excisable. Thirdly, it is not in dispute that even in respect of pentaerythritol the Assistant Collector has granted refund in case where the claim for refund was made within a period of six months. It is, therefore, obvious that the certificates issued by Dr. Nair cannot be relied upon to conclude that in trade circles the expression "alcohol" means only ethyl alcohol. Even otherwise I am not prepared to place any reliance on such trade meaning when the words of Tariff Item are crystal clear and leaves no ambiguity.

Finally, Shri Sethna referred to a format prescribed by the Assistant Commissioner, Prohibition and Excise, Maharashtra State for issue of release order for obtaining alcohol. Again I must express my inability to appreciate for what purpose reference is made to this proforma and how the Department can ever claim from this proforma that expression "alcohol all sorts" in Tariff item 68 means only ethyl alcohol. In my judgment, the effort made by the Department in the present petition is nothing but a desperate attempt to bypass the decision of the CEGAT and the circular issued by the Central Board of Excise and to try to recover duties from the importers, when in law such duty is not permissible. In my judgment, Tariff Item 68(a) clearly excludes payment of duty on every kind of alcohol and the item imported by the petitioner admittedly being one of alcohol, the recovery of duty was without any authority of law.

7. Finally Shri Sethna submitted that even if Central Excise duty is not payable,

still additional duty of customs can be levied, and in support of the submission reference was made to the decision of the Supreme Court in *Khandelwal Metal and Engineering Works and Another Vs. Union of India (UOI) and Others*, In my judgment, it is not necessary to examine this question, because even assuming that additional duty of customs can be levied, the question which arise in the present case is whether such duty has been prescribed under Tariff 68(a). Once it is found that such duty is not prescribed under Tariff Item 68(a) but "alcohol, all sorts" is excluded from payment of duty, then the question as to whether such duty can be levied or not does not survive for consideration. In my judgment, the petitioner is entitled to the relief of refund and the same having been wrongly refused by the Department, it is necessary to grant the relief of refund. I am not inclined to grant claim of interest on the amount of refund of duty as I am directing the respondents to refund the duty within a period of one month from today.

8. Accordingly, rule is made partly absolute and the impugned order dated September 26, 1986, copy of which is annexed as Exhibit "F" to the petition, is set aside and the respondents are directed to refund an amount of Rs. 15,688.94 to the petitioner within a period of one month from today. In case the amount is not paid over to the petitioner at the end of one month, then the Department shall also pay interest at the rate of 15% per annum on the said amount till the date of repayment. The respondents shall pay the costs of the petitioner.