

(1978) 11 KL CK 0008
In the High Court Of Kerala
Case No : O.P. No. 4269/79

Ruby Rubber Works Limited

APPELLANT

Vs

Asstt. Collector of Central Excise, I.D.O. and Others

RESPONDENT

Date of Decision : 22-11-1978

Acts Referred:

Central Excise Rules, 1944 — Rule 11, 13, 140, 173J, 27
Central Excises and Salt Act, 1944 — Section 3, 35
Constitution of India, 1950 — Article 226

Citation : (1980) 6 ELT 615

Hon'ble Judges : T. Kochu Thomman, J

Bench : Single Bench

Advocate : M. Pathrose Mathai, for the Appellant; T.R. Govinda Warriar, for the Respondent

Final Decision : Allowed

Judgement

T. Kochu Thomman, J.—The petitioner is a manufacturer of tread rubber which used for retreading rubber tyres. Tread rubber is one of the excisable goods mentioned under Item 16A of Schedule I to the Central Excise and Salt Act, 1944. Section 3 of the Act states : -

"3 Duties specified in the First Schedule to be levied. - (1) There shall be levied and collected in such manner as may be prescribed duties of excise on all excisable goods other than salt which are produced or manufactured in or imported by land into, any part of India, as, and the rates, set forth in the First Schedule.

The Central Excise Rules, 1944 (The Rules) provide for the manner of assessment. Rules 9, 10 and 10A deal with assessment in the ordinary course i.e., assessment by the departmental authorities. The provisions of Chapter VIIA deal with a different kind of assessments, relate to goods which have been levied by the Central Government in terms of Section 173A of the Act. Admittedly tread rubber is one of the materials which comes within the ambit of Chapter VIIA.

2. The petitioner had filed his returns for the relevant period viz. 4-7-1968 to 21-4-1971. The tax on the basis of self-assessment had been paid by the petitioner in the personal ledger account mentioned u/s 173-G. When the goods leave the petitioner's premises the duty payable in respect of such goods on the basis of self-assessment is generally paid into that account. The goods sold by the petitioner to their customers are sometimes returned to the petitioner in the form of cuttings which are later reprocessed and delivered back to those customers. According to the petitioner the cuttings which are returned to the petitioner, for reprocessing are not excisable goods as they had already been subjected to a levy. Ext. PI demand notice dated 19-6-1973 was served on the petitioner by the Asstt. Collector of Customs (1st respondent here) calling upon them to show cause why they should not be proceeded against in terms of Rule 9 (2). The petitioner contended before the officer that the goods in question had already been subjected to a self-assessment and they were therefore not liable to be proceeded against as stated under Ext. PI. This contention was rejected by the 1st respondent by Ext. P2 dated 15-12-1973. Against that order the petitioner filed an appeal (Ext. P3) before the Appellate Collector of Central Excise, Madras (the 2nd respondent herein). The appeal was dismissed by order of the 2nd respondent dated 12-8-1974 (Ext. P4) solely for the reason that it was time-barred.

3. Counsel for the petitioner, Shri Vellappally, raises several contentions. He says that the order was appealed against within time, although, on account of a wrong address, the memorandum of appeal did not reach the office of the Appellate Collector of Customs, Madras to which it was transmitted by the office of the Collector of Customs, Cochin. He submits that Ext PI show cause notice as well as Ext. P2 order were issued without authority and were therefore null and void. In any view of the matter, counsel submits, justice and equity require that the petitioner be given an opportunity to be heard by the departmental authorities on merits, he says that the petitioner on that ground, is entitled to the extraordinary remedy under Article 226 of the Constitution. All these contentions are strongly opposed by Shri T.R. Govinda Warriar, appearing for the respondents. According to him the appeal was filed clearly out of time. The order was passed within jurisdiction and was therefore not anullity, and in any view, counsel submits, that the extraordinary remedy under Article 226 should not be granted to a person who had slept over his rights.

4. I shall first refer to the arguments on jurisdiction. Shri Vellappally says that Rule 9 which is purported to have been involved by the impugned orders has no application to a case where they had seen an assessment, although a nil statement. According to a Counsel, Rule 9 applies only in cases where there was no assessment at all. The goods here in question had been subjected to a self-assessment, although there probably was, if the allegation of the Department is established, a short levy. The returns had been filed by the petitioner in respect of all the goods which left their premises, including the goods in question viz., the cuttings, Rule 9 reads as follows : -

"9. Time and manner of payment of duty.

(1) No excisable goods shall be removed from any place where they are produced, cured or manufactured or any premises appurtenant thereto, which may be specified by the Collector in this behalf, whether for consumption, export, or manufacture of any other commodity in or outside such place, until the excise duty leviable thereon has been paid in such place and in such manner as is prescribed in these Rules or as the Collector may require and except on presentation of an application in the proper form and on obtaining the permission of the proper officer on the form :

Provided that such goods may be deposited without payment of duty in a store-room or other place of storage approved by the Collector under Rule 27 or Rule 47 or in a warehouse appointed or licensed under Rule 140 or may be exported under bond as provided in Rule 13: Provided further that such goods may be removed on part-payment of duty leviable thereon if, the Central Government by notification in the Official Gazette, allow the goods to be so removed under Rule 49 :

Provided also that the Collector may, if he thinks fit instead of requiring payment of duty in respect of each separate consignment of goods removed from the place or premises specified in this behalf, or from a store room or warehouse duty approved, appointed or licensed by him keep with any person dealing in such goods an account current of the duties payable thereon and such account shall be settled at interval, not exceeding one month and the account holder shall periodically make deposit therein sufficient in the opinion of the Collector to cover the duty on the goods intended to be removed from the place of production, curing, manufacture or storage.

(IV) Where a person keeping an account current under the third proviso to Sub-rule (1) makes an application to the Collector for withdrawing an amount from such account current, the Collector may, for reasons to be recorded in writing, permit such person to withdraw the amount in accordance with such procedure as the Collector may specify in this behalf.

(2) If any excisable goods are, in contravention of Sub-rule (1) deposited in or removed from, any place specified therein, the producer or manufacturer thereof shall pay the duty leviable on such goods upon written demand made by the proper officer, whether such demand is delivered personally to him, or is left at his dwelling house, and shall also "be liable to a penalty which may extend to two thousand rupees, and such goods shall be liable to confiscation."

Sub-rule (1) of Rule 9 prohibits, subject to certain exceptions, the removal of excisable goods from the premises of a producer or manufacturer until the duty is paid. Sub-rule (2) provides that upon written demand of the officer the duty leviable on such goods shall be paid by the producer or manufacturer. It further provides for the imposition of penalty on the producer or manufacturer and the confiscation of such goods.

Rule 10 reads as follows : -

"10. Recovery of duties or charges short-levied or erroneously refunded.-(1) When duties or charges have been short levied through inadvertence, error, collusion or misconstruction on the part of an officer, or through misstatement as to the quantity, description or value of such goods on the part of the owner, or when any such duty or charge, after having been levied, has been owing to any such cause, erroneously refunded, the proper officer may, within three months from the date on which the duty or charge was paid or adjusted in the owner's account current, if any, or from the date of making the refund, serve a notice on the person from whom such deficiency in duty or charges is or are recoverable requiring him to show cause to the Assistant Collector of Central Excise why he should not pay the amount specified in the notice.

(2)- The Assistant Collector of Central Excise, after considering the representation, if any, made by the person on whom notice is served under Sub-rule (1), shall determine the amount of duty or charges due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined within ten days from the date on which he is required to pay such amount or within such extended period as the Assistant Collector of Central Excise, may, in any particular case allow."

Rule 10 relates to short-levy and it provides* for payment of the deficient duty. Power under Rule 10 can be exercised only within the time stipulated therein. This is in contrast with Rule 9 which provides for no such limitation. Rule 10 is made applicable even in respect of goods coming under Chapter VII-A of the Rules. Rule 173 J says :

"The provisions of Rules 10 and 11 shall apply to the assessee as if for the expression "three months", the expression "one year" are substituted in those rules."

Consequently in respect of materials which have been subjected to self-assessment in terms of Chapter VII A, the provisions of Rule 10 would apply wherever there was short-levy, provided action is taken within the period of one year.

5. Shri Vellappally says that the goods in question, having been already declared by filing the required returns, cannot be treated as coming under Sub-rule (2) of Rule 9. These goods can, if at all, come only within the ambit of Rule 10, subject of course to the period of limitations. Counsel says that these goods had been self-assessed in terms of the provisions of Chapter VII-A, the returns having shown them as nil-assessed, and if duty is found to be payable on such goods, it would be a case of short levy requiring payment of the deficient duty in terms of Rule 10. Proceedings for such purpose must commence within one year from the date on which duty was payable. Counsel relies on the principle stated by the Supreme Court in *N.B. Sanjana, Assistant Collector of Central Excise, Bombay and Others Vs. The Elphinstone Spinning and Weaving Mills Company Ltd.*, . It is

further submitted that Ext. P 9 refers to Rule 9 which cannot apply to these goods as they had already been nil-assessed. Counsel says that even assuming that the rule was wrongly mentioned in Ext. PI and that the department is entitled to proceed, dependent on the facts under Rule 10, Exts. PI and P2 were obviously time-barred-and therefore invalid.

6. Difficult questions have been raised in this petition. On the basis of the present pleadings or the facts stated in the impugned orders, it is not clear whether the goods in question come within the ambit of Rule 10 or Rule 9 or any other provision of the Rules such as Rule 10A. Whether or not returns had been filed in respect of these goods, is not clear, although, there is an averment to that effect. Assuming that returns had been filed, whether they were filed in accordance with the Rules, is again not clear. But one thing is clear, that is, the respondents have not established that the goods in question come within the ambit of Rule 9, that is precisely the question which they ought to have addressed their minds to. If the goods did come within the scope of Rule 9, Exts. PI and P2 were well within time. On the other hand, if Rule 10 applied, Exts. PI and P2 were out of time.

7. In proceedings under Article 226 it is not possible to investigate these difficult facts. In the normal course the assessee has a right to be heard as to these facts and applicability of the provisions of law invoked. It is however contended on behalf of the respondents that petitioner's appeal before the Collector of Customs was filed out of time. I shall therefore address myself to that question. It is stated in the petitioner's affidavit as well as in their revision petition filed before the 3rd respondent that the appeal was sent to the 2nd respondent, albeit in the wrong address, by registered post from Changanacherry on 2-4-1974. The letter was, unfortunately for the petitioner, addressed through inadvertence to the Appellate Collector of Customs, Cochin. It is stated by the petitioner that it was transmitted by that office to the correct address of the 2nd respondent at Madras. Unfortunately again for the petitioner on account of the delay involved in the transmission, the appeal was received after the date on which the period of limitation u/s 35 of the Act had expired. It is not controverted in the affidavit filed on behalf of the respondents that the appeal was transmitted as stated by the petitioner. It is not stated and in my view it ought to have been stated, for these are matters within the special knowledge of the Department as to when exactly the registered cover, if at all, was received at the Cochin Office; on what date it was transmitted; and, on what date it was received by the office of the Appellate Collector of Customs at Madras. It would have expected that on a crucial question such as this sufficient light would have been provided by the respondents. But then their affidavit, is silent on all this. I would have also expected the department to produce the envelope which also would have shown the dates of transmission and receipt. A letter which was posted in Changanacherry on 2nd April, 1974 ought to have in the normal course reached the Cochin Office either on the 3rd or on the 4th. The date on which the time expired was the 5th. If the letter was in fact transmitted by the Cochin Office on

the 3rd it would have in the normal course reached the Madras Office either on the 4th or the 5th. If it was received on the 5th it was well within time. There again we have no explanation whatsoever.

8. Shri Warriar is justified in contending that this Court would not come to the aid of a person who has slept over his rights. Normally this court would be extremely reluctant to entertain a petition under Article 226 at the instance of such a person. In the present case it is not clear to me from the available facts that the petitioner had failed to lodge his appeal within the stipulated period. Shri Warriar further contends that in view of the alternative remedy which was available to the petitioner, the present petition under Article 226 cannot be entertained. This is not a case where it can be clearly and categorically stated that the petitioner had failed to have recourse to the alternative remedy available to them. This is again a case where it is not clear from the facts available and the nature of the procedure prescribed under the rules that the impugned order Ext. P2 was made within jurisdiction at all. I cannot of course express my view on it at this stage. That is a question to which the department ought to have applied its mind.

9. In view of the peculiar circumstances of this case, and the difficult questions raised relating to jurisdiction, I am of the view that an opportunity should be given to the petitioner to be heard by the appellate authority. Even assuming that the petitioner's appeal was ultimately received by the appellate authority outside the period of limitation. In view of the fact that, if the appeal had not been wrongly addressed, it would have in all probability reached the appellate authority well within time. I am of the view that Ext. P3 appeal should be taken back on file by the appellate authority and disposed of on merits.

10. I set aside Ext. P4 order of the 2nd respondent and direct him to consider Ext. P3 appeal and dispose of the same on merits. I should like to make it clear that none of my observations shall be taken to have touched the merits of the case in any manner whatever. The original petition is accordingly allowed. No costs.