

(1984) 07 AP CK 0016

In the Andhra Pradesh High Court

Case No : Writ Petition No's. 5451 and 5452/78

Sirpur Paper Mills Ltd.

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 16-07-1984

Acts Referred:

Central Excise Rules, 1944 — Rule 13, 140, 27, 47, 8
Central Excises and Salt Act, 1944 — Section 3, 3(1), 4

Citation : (1985) 4 ECC 186 : (1984) 17 ELT 217

Hon'ble Judges : Seetharam Reddy, J;A. Raghuvir, J

Bench : Division Bench

Advocate : P. Ramachandra Reddy, for the Appellant; K. Nagaraja Rao, Standing Counsel and Central Government, for the Respondent

Judgement

Seetharam Reddy, J.—Common point is involved and therefore, these two Writ Petitions are disposed of by a common order.

2. M/s. Sirpur Paper Mills Ltd., Hyderabad, who is the petitioner in these two cases, claims concessional rates of excise duty for the years 1976 and 1977 by seeking to issue a certiorarised mandamus for quashing the order of the Government of India confirming the orders of the Assistant Collector of Central Excise and the Appellate Collector of Central Excise and a consequential direction for the refund of excess duty collected.

3. The format of the case in brief is - the petitioner, a public limited company, carries on the business of manufacturing paper at Sirpur-Kaghaznagar. The petitioner enlarged their production capacity by installing new paper machines in their manufactory, which came into production from about the month of April 1967. The Government of India, first respondent herein, by their notification No. 163/65 dated 1-10-1965 extended concessional rates in respect of paper which was attributable to the enlarged production capacity of the producers and cleared after 1-3-1964. Under the said notification, as averred by the petitioner, issued under sub-rule (1) of Rule 8 of the Central Excise Rules, 1944 (hereinafter

referred to as "the rules") the concession was to operate with reference to the period during which the paper was manufactured. However, the said notification was rescinded by Notification No. 87/73 dated 1-3-1973. The petitioner had claimed the benefit of the concessional rates of Excise duty in respect of the paper produced during the period related to the enlarged production capacity but removed from the factory after 1-3-1973, the date on which the earlier notification came to be rescinded. The Assistant Collector, Central Excise, 3rd respondent herein, based on the provisions of Rule 9A of the Rules, rejected the claim on the ground that the concession will not be available in respect of any stocks that are held by the manufacturers after the notification dated 1-3-1973 and that the petitioner was liable to pay the full rate of duty. Aggrieved against, the petitioner preferred unsuccessfully an appeal before the Appellate Collector, Central Excise, 2nd respondent herein and a revision before the Government of India, first respondent herein, resulting in the confirmation of the orders of the 3rd respondent on the ground that under Rule 9A the rate of duty applicable is the one prevailing at the time of its removal from the place of manufacture and the tariff rate read with any exemption notification comes into play only at that time, since at the time of clearance the exemption notification stood rescinded, the right or benefit contemplated under the said notification became extinguished. Hence these Writ Petitions.

4. The argument in the main of the learned counsel for the petitioner Sri P. Ramachandra Reddy, is that Excise duty is essentially a tax on the manufacture or production of goods and when exemption is granted on the criterion of production due to expanded capacity, the very act of production attracts the applicability of the exemption notification and therefore, the stage of removal of the goods from the factory has no relevance.

5. The counter contention of Sri K. Nagaraja Rao, learned Standing Counsel for the Central Government, is that Rule 8 on which the petitioner relies upon, does not indicate the impost of duty as it is only on incidence; whereas Rule 9A which is the relevant provision, postulates the exigibility of tax at a time when the goods manufactured are removed. Before analysing the rival contentions, the relevant statutory provisions be noticed.

6. Section 3(1) of the Central Excises and Salt Act, 1944, reads as under :

"Levy and Collection of duty

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 India, and a duty on salt manufactured in, or imported by land into, any part of India as, and at the rates, set forth in the First Schedule.

(A) The provisions of sub-section (1) shall apply in respect of all excisable goods other than salt which are produced or manufactured in India by, or on behalf of, Government, as they apply in respect of goods which are not produced or

manufactured by Government."

7. Section 4 of the Act reads :

"4. Determination of value for the purpose of duty. - Where under this Act, any article is chargeable with duty at a rate dependent on the value of the article, such value be deemed to be -

(a) the wholesale cash price for which an article of the like kind and quality is sold or is capable of being sold at the time of the removal of the article chargeable with duty from the factory or any other premises of manufacture or production for delivery at the place of manufacture or production, or if a wholesale market does not exist for such article at such place, at the nearest place where such market exists, or

(b) where such price is not ascertainable, the price at which an article of the like kind and quality is sold or is capable of being sold by the manufacturer or producer, or his agent, at the time of the removal of the article chargeable with duty from such factory or other premises for delivery at the place of manufacture or production or if such article is not sold or is not capable of being sold at such place, at any other place nearest thereto.

Explanation. - In determining the price of any article under this section no abatement or deduction shall be allowed in respect of trade discount and the amount of duty payable at the time of the removal of the article chargeable with duty payable at the time of the removal of the article chargeable with duty from the factory or other premises aforesaid."

8. Rule 8 of the Central Excise Rules, 1944, reads as under :

"8. Power to authorise exemption from duty in special cases. - (1) The Central Government may from time to time by notification in the Official Gazette, exempt subject to such conditions as may be specified in the notification any excisable goods from the whole or any part of duty leviable on such goods,

(2) The Central Board of Excise and Customs, may by special order in each case exempt from the payment of duty, under circumstances of an exceptional nature any excisable goods."

9. Rule 9 runs as under :

"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 at 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."

10. Rule 9A reads as under :

"9A Date for determination of duty and tariff valuation. - (1) The rate of duty and tariff valuation, if any, applicable to any excisable goods, shall be the rate and valuation in force.

(i) in the case of goods cleared from the premises of a curer on payment of duty, on the date on which the duty is assessed, and,

(ii) in the case of goods cleared from a factory or a warehouse, subject to sub-rule (2), (3) and (3A), on the date of the actual removal of such goods from such factory or warehouse.

(2) If the goods have previously been removed from warehouse under bond to be rewarehoused, and the duty is paid on such goods without their being rewarehoused, the rate and valuation, if any, applicable thereto shall be the rate and valuation, if any, in force on the date on which duty is paid or if duty is paid through an account-current maintained with Collector under rule 9, on the date on which an application in the proper form is delivered to the officer-in-charge of the warehouse from which the goods were removed.

(3) Where any person who has removed excisable goods for export in bond fails to export or to furnish proof of such export to the satisfaction of the Collector or diverts the goods for home consumption, the rate of duty leviable and the tariff valuation, if any, in respect of such goods shall be the rate and valuation in force on the date on which the duty is paid."

The case law cited be also noticed :

Case law for the petitioner :

11. Kirloskar Brothers Ltd. v. Union of India - 1978 E.L.T. 33. - In this case Writ of Certiorari was sought to quash the demand dated 20-3-1972 directing the petitioner to pay the excise duty on the pre-budget stocks declared on 16-3-1972 of power driven pumps and a mandamus restraining the respondents from recovering the excise duty from the petitioner as a condition precedent to the removal of the power driven pumps, admittedly manufactured from 1-3-1968 to 16-3-1972 during which period no excise duty was leviable. In those circumstances, a Division Bench of the Madhya Pradesh High Court held :

"It is always open to the legislature to make a tax operative retrospectively. But

even such retrospective operation will not change the nature of tax and it will be payable according to the provisions enacted in the charging section of the relevant statutes. Therefore, interpreting Section of the Central Excises and Salt Act, 1944, we are of the opinion that the liability for tax, namely, the excise duty would arise no sooner the manufacture or the production is completed and it is immaterial as to what machinery may be devised by the Central Government under the rule making powers for recovery of a tax. The point of recovery or any restriction on removal will not be the determining factor for grant of exemption in respect of goods manufactured during the duty free period."

12. In *Union of India v. Delhi Cloth & General Mills Co. Ltd.* - 1978 E.L.T. (117) a Division Bench of the Allahabad High Court held :

"Excise duty is leviable on the goods, produced by manufacturer. It is not a duty on the sale or removal of goods, therefore, goods produced during the exemption period are entitled to the benefits of the exemption notification even though they are removed from the place of manufacture when the exemption notification is not in force."

13. In *U.O.I. v. Kirloskar Brothers* - 1978 E.L.T. (690) while refusing leave to appeal to the Supreme Court against the judgment in *Kirloskar Brothers Ltd. v. Union of India* (cited supra), a Division Bench of the Madhya Pradesh High Court held :

"Excise duty being a tax on manufacture or production, the material time for liability of excise duty u/s 3 will be the date of manufacture or production. Therefore, if the notification withdrawing the exemption came into effect from 16-3-1972 and had no retrospective operation, the excisable articles which were in stock till 16-3-72 were exempt from excise duty and excise duty would be payable on excisable articles produced or manufactured on 17-3-1972 and onwards only."

Case law for the respondent :

14. In *U.O.I. v. Elphinstone Spg. & Wvg. Mills Co. Ltd.* - 1978 E.L.T. (680) a Division Bench of the Bombay High Court while construing the provisions of Section 3, Rules 7, 8, 9 and 9A, held :

"One does not find any warrant in the Central Excise Act or the rules to spell out a construction that it is only the stage of manufacture or production of goods which attracts duty. Therefore, if at the date when the goods are removed from the place of manufacture, they are specified in Schedule I, they cannot be removed unless duty is paid on them, even though such goods have been manufactured when there was no excise duty on them."

15. In *Alembic Chemical Works Co. Ltd., Baroda v. Union of India and Others* - 1979 E.L.T. (258) a Division Bench of the Gujarat High Court, while considering the effect of withdrawal of exemption notification under Rule 9A, held :

"When a concession flows from the rules, the effect of the withdrawal of that concession would save to be judged by the relevant rules themselves which provide a crucial date and for this purpose under rule 9A the rate of duty shall be the duty in force at the time of removal of these goods. Therefore, the goods manufactured prior to the withdrawal of exemption notification but removed thereafter, would not be entitled to such exemption."

Further held :

"It is clear that the goods in question became excisable when the relevant Tariff Item IB was added to the 1st Schedule to the Central Excise Act. But, the duty imposed was foregone on these excisable goods to the full extent by the exemption notification issued under rule 8 of the Central Excise Rules. Therefore, once that exemption notification is superseded, it is obvious that excisable goods in question attracted duty to the fullest extent because it was merely substitution of the rate of full duty for the "nil" duty. The analogy of pre-budget stock is not applicable in such cases."

Also held :

"It is true that levy and exemption are parts of the same scheme of taxation because the two together carry into effect the purpose of the legislation. In order to find out the true scheme of a taxing measure, it is not merely levy that has to be taken into consideration, but also exemption granted. Hence, the charging section has to be interpreted along with the relevant exemption as one whole integrated scheme."

16. In *Kesar Sugar Works v. Union of India and Others* - 1980 E.L.T. 285 the Allahabad High Court held :

"It is true that excise duty is on the manufacture or production of goods but the above rules leave no room for doubt that it is leviable at a time of removal of goods from the place of manufacture and not with reference to the manufacture of excisable goods. Thus, the taxable event is the date of removal and not the date of manufacture of goods. Therefore, stock of molasses available with the petitioner before 18-6-1980 when Item 15CC was introduced in the Central Excise Tariff by Finance Act, 1980, would be liable to duty under Item 15CC."

Further held :

"It is true that excise duty by its very nature is on the production or manufacture of goods. But, it can be levied at any convenient stage so long as the character of impost is not lost. However, the method of collection does not affect the essence of the duty but only relates to the machinery of collection for administrative convenience."

17. A Division Bench of the Madhya Pradesh High Court in M.P. No. 338/79, dated 16-1-1982, while differing from the earlier decisions of that Court, held, based on the provisions enacted in Rule 9A, "that the excise authorities were right in

applying the rates prevailing on the date of removal."

18. Section 3 of the Act, which seeks to levy and collect duty reads in effect and substance, omitting unnecessary clauses, as under :

"There shall be levied and collected..... duties of excise on all excisable goods..... which are produced or manufactured in India.... and at the rates set forth in the 1st Schedule."

In sum, levy of excise duty is on goods which are produced or manufactured. So, the impost is on the production or manufacture of the excisable goods. In fact, this has been so held by the Supreme Court. (vide A.K. Roy and Another Vs. Voltas Limited, and Atic Industries Ltd. Vs. H.H. Dewa, Asstt. Collector of Central Excise and Others, . In other words, imposition of the duty is on the goods produced or manufactured. Section 4 provides for the determination of the value of the goods for the purpose of duty; Rule 8 enables the Authority to exempt certain goods in special circumstances, partially or wholly, from the imposition of excise duty; Rule 9 lays down the time and mode of payment of duty and Rule 9A schedules the date for determination of duty and tariff valuation. So, in effect the aforesaid four provisions indicate as to how, when, where and at what point of time the excise duty is to be determined and paid. It is fairly settled that the impost is primarily the concern of the legislature; and the manner, the mode, the determination and collection is the responsibility of the quasi-judicial body and the executive body. The answer, therefore, to the proposition, which falls for determination in these cases, is found in Section 3 and not in any other section or rule, including Rule 9A.

19. On a conspectus of the cases cited by the respondents, what we find is that much emphasis is laid on Rule 9A. True, what Rule 9A stipulates is that the rate of duty shall be the one which is in vogue on the date when the duty is assessed. But, nevertheless it should not make any difference, as there cannot be any quarrel, that the provisions postulated by the said rule lays down more the mode and manner of assessment. It does not answer the question posed herein. The question is, what is that attracts the tax and not when, how and to what extent it attracts. In our undoubted view, as we observed earlier, the attraction of tax is at the very threshold when excisable commodity is manufactured or produced, notwithstanding the point of its removal, consumption or being caused the disappearance of. We are, therefore, unable to be in line with the view adopted by the High Courts of Judicature at Bombay, Gujarat and Allahabad in the cases cited supra.

20. The Madhya Pradesh High Court appears to have made a departure from its earlier two decisions in M.P. No. 338/79 when it held "that the excise authorities were right in applying the rates prevailing on the date of removal", and thereby agreed with the conclusions reached by the Bombay and Gujarat High Courts, which have been referred to herein-above. Their Lordships of the Madhya Pradesh High Court in the abovesaid case having referred to the observations of

the Supreme Court in *Shinde Brothers etc. Vs. Deputy Commissioner and Others*, etc., to the effect that "a duty of excise is clearly related to production or manufacture of goods but it does not matter if the levy is made not at the moment of production or manufacture but at a later stage and that if the duty is collected from a retailer it would not necessarily cease to be an excise duty", were nevertheless led away by the provisions enacted in Rule 9A as well as the observations of Gwyer, C.J. in *Province of Madras v. Boddu Paidanna & Sons* - AIR 1942 F.C. 33 wherein it is observed : "that the taxing authority does not ordinarily levy excise duty at the stage of manufacture or production for it is more convenient administratively to levy the duty when the goods leave the factory for the first time."

21. We apprehend, with great respect, the learned Judges misconceived the effect and impact of the observations of Gwyer C.J. as well as the provisions enacted in Rule 9A. Merely because the mode and method adopted is to collect duty at a later stage, viz., at the time of clearance or removal of goods because of administrative convenience, the point of impost which is sine qua non in adjudicating as to when the commodity attracts duty, cannot be postponed.

22. A good look at the provisions in Rule 9A makes it pretty clear that four varied points of clearance are postulated for the determination of duty and tariff valuation, which should not be mixed up with or mistaken for the imposition of duty, which is the chief criterion for answering the question in this case.

23. We may also usefully refer to the approach made by the Government of India in Revision No. 23 of 1981 dated 7-1-1981 in *In re J. K. Steel & Alloys, Bunder Road* - 1982 E.L.T. 655 wherein the facts are rather akin to the case on hand. In that case after referring to the decision of the Madhya Pradesh High Court in *Kirloskar Brothers Ltd. v. Union of India* - 1978 E.L.T. (33) the Government of India accepted the petitioners contention holding that the petitioner should not have been denied the benefit of the exemption notification though the same stood rescinded at a time when the goods were cleared. True, there was an additional factor in that case, viz., that the petitioner had claimed the benefit of the notification in respect of those goods on 15-1-1974 i.e., before the exemption was withdrawn, but their request was disallowed stating that they would have to file a fresh classification list as applied to past clearances and not to the clearances effected after the issue of the order in appeal. Nevertheless the fact remains essentially the Government of India appears to have been attracted by the ratio laid down by the Madhya Pradesh High Court in *Kirloskar Brothers Ltd. v. Union of India*.

24. The contention of the learned Standing Counsel for the Central Government that the decision in *Kirloskar's* case should not be a guideline in adjudicating the case on hand for the reason that that case was concerned with the goods wholly exempted, has no substance inasmuch as on principle it makes no difference whether the matter pertain to partial or total exemption. Likewise, the contention in regard to the dismissal of the S.C.L.P. on merits by the Supreme Court passed

on September 1, 1977 against the aforesaid judgment of the Madhya Pradesh High Court in Kirloskar's case, it should not be taken to be really a decision on merits, also merits no consideration, as it is fairly settled by now that when the court records its order as dismissal on merits, it must be taken to have been a decision on merits.

25. Yet another aspect. When a notification is issued extending exemption, partial or total, with reference to, say, expansive production as in this case, and the assessee on that court produces or manufactures goods in compliance of the said notification and if the authority rescinds the same after the goods are manufactured and before the goods are cleared or removed for one reason or the other, then the very scheme and object behind such exemption clause is rendered abortive, stultifying the very incentive accorded to the manufacturer or producer. Surely this could not be the intention of the authority concerned. We find it hard to accede to the contentions advanced by the learned Standing Counsel for the Central Government.

26. From the foregoing, therefore, it is manifest and we unhesitatingly hold that the excise duty would arise the moment the manufacture or production of the commodity is complete irrespective of the fact that the assessment and collection is postponed to a later point of time when the said commodity is cleared or removed; the incidence for the impost being the manufacture or production of goods. If that be so, the petitioners are entitled to have the benefit of the exemption notification and so, the refund of the excess duty paid.

27. In the result, the impugned orders are quashed and the respondents are directed to refund the excess duty collected. The two Writ Petitions are allowed accordingly. No costs.