
(1998) 04 MAD CK 0036

In the Madras High Court

Case No : Writ Petition No's. 15240 to 15242 of 1988

South India Structural Corpn. Ltd.

APPELLANT

Vs

Asstt. Collr. of C. Ex.

RESPONDENT

Date of Decision : 24-04-1998

Acts Referred:

Central Excise Rules, 1944 — Rule 49, 9

Central Excises and Salt Act, 1944 — Section 11A, 2, 3

Citation : (1998) 102 ELT 13

Hon'ble Judges : K. Sampath, J

Bench : Single Bench

Advocate : N. Venkataraman, for the Appellant; K. Jayachandran, A.C.G.S.C., for the Respondent

Final Decision : Dismissed

Judgement

K. Sampath, J.—W.P. No. 15240 of 1988 is for the issue of writ of mandamus directing the respondents to forbear from levying duty of

excise under the provisions of Central Excises and Salt Act, 1944 read with Heading 7308.90 of the Central Excise Tariff Act, 1985, in respect of

structural fabrication work carried out by the petitioner for Chettinad Cement Corporation Limited under Order No. MOD/FC/86, dated 3-1-

1987 insofar the petitioner is concerned.

2. W.P. No. 15241 of 1988 is for the issue of writ of declaration that Heading 73.08 of the Central Excise Tariff Act, 1985 is ultra vires and

unconstitutional offending Entry 84 List I of the Seventh Schedule to the Constitution of India and void and unenforceable insofar as the petitioner

is concerned.

3. W.P. No. 15242 of 1988 is for the issue of writ of mandamus directing the

respondents to forbear from levying duty of excise under the provisions of the Central Excises and Salt Act, 1944, read with Heading 7308.90 of the Central Excise Tariff Act, 1985 or in any manner invoking the provisions of the said Act including obtaining direction and following attendant formalities on the structural fabrication work carried out by the petitioner at the project site of India Cements Ltd., under letter of Intent No. GMT/D222/87/4724, dated 31st August, 1987 insofar as the petitioner is concerned.

4. The points arising for decision in all the three writ petitions are the same.

5. According to the petitioners, who are structural engineering contractors doing structural work for various companies, took composite contracts

for structural work from various organisations. These organisations provided the petitioners with requisite structural steel like angles, channels,

sheets, etc. These materials had already suffered duty and they were subjected to processing by the petitioners like cutting, welding, jointing and

the work was done at the site summarised by the concerned organisations. The entire work belong to factory and the entire work was done at the

customers" premises. The petitioners had limited ingress and egress into the area of work limited to the job. The work done by the petitioners had

always been regarded as not involving in manufacture much less creation of goods. The respondents or its officers or agents had on occasions

sought to impose the duty on the work, but it had been held by successive authorities and adjudicating forums that the work did not involve

manufacture of goods as known to the market and in fact the work fall short of being styled as manufacture. The various authorities and tribunals

had held that the work did not involve creation of goods, and therefore, there was no duty payable. The decisions by the authorities had been

accepted by the respondents as they had not been challenged by them.

6. After the coming into force of the Central Excise Tariff Act, 1985, schedule to the Central [Excises] and Salt Act, 1944, was deleted and the

goods were independently classified by a separate Act. Subsequent thereto, revenue started taking a stand that the work carried out by the

petitioners were appropriately covered under Heading 7308 of Chapter 73 of the Tariff Act. The Superintendent of Central Excise had also

clarified that the structurals were not goods and did not attract excise duty. After

such finding, the petitioners discontinued the excise formalities.

However, the authorities had started taking a view that the petitioners were liable under Heading 7308.90 for the steel structurals and under

Heading 9406.00 for alleged fabricated building. The petitioners had not manufactured any pre-fabricated building, but were doing only structural

fabrication work, who were progressively erected at site. In fact, any instance of duty on the structural fabrication work will be far higher than the

fabrication charges received by the petitioners.

7. As already stated, the work as carried out by the petitioners did not result in creation of work, but construction of complete construction

contract had been accepted by the Supreme Court in *State of Madras v. Richardson and Cruddas Ltd.*, 21 S.T.C. 245. It has been held in *Union*

of India (UOI) Vs. Delhi Cloth and General Mills, and *Union Carbide India Limited Vs. Union of India (UOI) and Others*, , that Entry 84 of the

was (sic) only to levy a duty of excise on goods manufactured and this expression would require not only that there should be manufacture, but

also creation of goods and merchandise and known to the market. The attempt of levy of duty on a total misconstruction of Chapter 73 was illegal

without authority of law and unconstitutional. Aggrieved, the present writ petitions have been filed.

8. A counter has been filed in W.P. 15241 of 1988 stating inter alia as follows:

In respect of M/s. Beehive Foundry Engineering Works, Madras, which was one among the group of companies under M/s. Indian Commerce &

Industries Co. P. Ltd., the writ petitioner in W.P. No. 15241 of 1988, who manufactured some items like purlins, gussets, stanchions, M/s. Base

Plates etc., and were clearing these items without payment of duty on the plea that they were only semi-fabricated items made out of iron and steel

products by cutting them and therefore, not excisable. An order was passed demanding duty for all clearances of such articles u/s 11A of the

Central Excises and Salt Act, 1944. It was held that it would apply to clearances on or after the date of issue of show cause notice. Aggrieved,

M/s. Beehive Foundry Engineering Works went on appeal. The Collector (Appeals), Madras, in Order-in-Appeal No. 176/86 (M), dated 1-7-

1986 (A. No. 3/86 M) set aside the order of the Assistant Collector, allowed the appeal, holding that substantial identity was retained between

duty paid iron and steel and semi-processed goods removed and these items could not be called goods for Central Excise purposes in view of

Member Central Board of Excise and Customs Order-in-Appeal No. 264/81, dated 15-12-1981 as reported in E.L.T. 1982 page 439, as per

Order Nos. 253 to 257 of 1986 of the Tribunal. However, the Department had filed an appeal against this Order-in-Appeal No. ,176/86 (M),

dated 1-7-1986 and at the time of filing the Counter, the appeal had not been disposed of.

9. However, having regard to the passing of the Central Excise Tariff Act, 1985, the position or decision in the earlier proceedings would not be

relevant. Under the new Act, M/s. Beehive Foundry Engineering Works, filed the classification list for these structurals under Chapter sub-heading

7308.90 as ""other articles of iron or steel"" ""under protest"" as they contended that unless a product was specifically mentioned in the new Tariff Act,

no excise duty was payable on the same. The classification list filed ""under protest"" was approved as such and the protest was yet to be vacated.

Some amendments to Chapter 73 were made with effect from 1-3-1988, wherein, structurals had been clearly classified under Chapter Heading

No. 73.08 and these structurals of M/s. Beehive Foundry Engineering Works would fall under Chapter No. 7308.90. The petitioner in the writ

petition had also filed necessary classification list for the same under Chapter sub-heading No. 7308.90 ""under protest"".

10. Since the decision of the Tribunal regarding excisability of the structurals was awaited, raising the said matter in a Court of law was premature.

In a similar placed case filed by M/s. Siemens India Ltd., in W.A. No. 566 of 1989 this Court held contrary to the stand of the petitioner in W.P.

No. 15241 of 1988, no concrete evidence for the non-excisability of the product had been adduced. Inasmuch as the case put forward by the

petitioner was coming within the ambit of Chapter sub-heading No. 7308.90, under the Central Excise Tariff Act, 1985, there could be no doubt

as to the excisability of these items and the writ petition was liable to be dismissed on this ground. Even after the amendment to Heading No. 73.08

with effect from 1-3-1988, the position did not change. In fact, the amended heading was now even more specific and these fabricated structural

would merit classification under sub-heading 7308.90. There was nothing ultra vires or invalid in the provisions of Heading No. 73.08 and rate of

duty prescribed under the provisions of Section 3 of the Central Excises and Salt Act, 1944, was well within the scope of charging section. The

entries in the Tariff Act must fall within the ambit of Entry 84, List I of the Seventh Schedule. The petitioner's (W.P. 15241 of 1988) averment that

it was beyond the legislative competence under Entry 84 was without substance. The entry "Others" in Chapter sub-heading No. 7308.90 would

definitely cover the disputed items. The Heading 7308 and sub-heading No. 7308.90 after the amendment setting at rest any doubts whatsoever.

There was no misconception or miscarriage of justice. The matter was pending adjudication at the Tribunal as already stated. The collection of

excise duty of structurals was as per the Central Excise Tariff Act, 1985. The writ petition was liable to be dismissed.

11. At the hearing, it was represented by the learned Counsel for the Department that pending decision by the Tribunal, the Department was not

going to take any action whatsoever with regard to the excisability of structurals concerned in the writ petition, and also other similarly placed

claimants. The statement is recorded.

12. The learned Counsel for the writ petitioners Mr. Venkataraman referred to a number of authorities on the subject and in particular, Moti

Laminates Pvt. Ltd. and Others Vs. Collector of Central Excise, Ahmedabad, , Kinetic Honda Motors Ltd. Vs. Union of India (UOI), , and Union

of India (UOI) Vs. Bajaj Tempo Ltd., . The learned Counsel also brought to the notice of this Court certain decisions by the Tribunal, namely,

Customs, Excise and Gold (Control) Appellate Tribunal.

13. It is not necessary to refer to all those decisions, Suffice to refer to the judgment of the Supreme Court, namely, Moti Laminates Pvt. Ltd.'s

case. The case arose under Sections 2(d), 2(f) and 3 of the Central Excises and Salt Act, 1944. The Supreme Court held that intermediate goods

produced and used for captive consumption was not liable to duty if not marketable, notwithstanding the fact of their being specified in Tariff

Schedule and retrospective amendment of Rules 9 and 49 of Central Excise Rules, 1944. Sections 2(d), 2(f) and 3 of the Central Excises and Salt

Act, 1944. After tracing the development of law that in goods produced or manufactured ipso facto, did not attract duty unless they were

marketable or capable of being marketed, the Supreme Court then examined the

dutiability of the goods captively consumed and held that even after all rules were amended and fiction was created that any article produced or manufactured if captively consumed was statutorily the presumption to satisfy the test of marketability, still that presumption could be rebutted if it was established that the article produced and captively consumed was neither goods, nor marketable, nor capable of being marketed. The Supreme Court set aside the finding of the Tribunal in that case that once the product manufactured by the appellants in that case answered the chemical description of the product in Tariff 15A(1) of erstwhile Central Excise Tariff, it was assessable to duty whether it was marketable or not, was not well founded.

14. The Madhya Pradesh High Court in *Kinetic Honda Motors Ltd. v. Union of India*, held that the process of drilling, cutting and welding of duty paid iron and steel products for construction of shed, does not amount to "manufacture" and the article so used were not liable to be classified as "goods" within the meaning of Section 3 of Central Excises and Salt Act, 1944 and not chargeable to duty.

15. Again, in *Union of India v. Bajaj Tempo Ltd.*, 1985 (80) E.L.T. 774 (M.P.), it was held by the Indore Bench of the Madhya Pradesh High Court that fabrication and construction of shed by subjecting the plates, channels and angles to the process of cutting, drilling and welding did not amount to manufacture of excisable products and such sheds being embedded to earth could not be taken out of the factory and hence not marketable. The Madhya Pradesh High Court followed the judgment of the Supreme Court in *Quality Steel Tubes (P) Ltd. Vs. Collector of Central Excise, U.P.*, .

16. In view of the established position, it has to be held that the petitioners in the writ petition did not indulge in any manufacture resulting in marketable goods, which were excisable. The prayers in the writ petition Nos. 15240 and 15242 of 1988 are granted. It is not necessary to declare that Heading 73.08 of the Central Excise Tariff Act, 1985, is ultra vires and unconstitutional offending Entry 84, List 1 of the Seventh Schedule to the Constitution of India. It is not necessary to decide that now, in view of the decision in the other two writ petitions.

17. The writ petitions 15240 and 15242 of 1988 are allowed, and writ petition

15241 of 1988 is dismissed. There will be no order as to costs.