
(1985) 02 MAD CK 0060
In the Madras High Court
Case No : Writ Appeal No. 209 of 1978

Sri Ganesh Match Works

APPELLANT

Vs

Union of India and Another

RESPONDENT

Date of Decision : 14-02-1985

Acts Referred:

Central Excise Rules, 1944 — Rule 10, 11, 173E, 173G, 173J

Citation : (1986) 9 ECC 285 : (1985) 20 ELT 247

Hon'ble Judges : Ramanujam, J; M.A. Sathar Sayeed, J

Bench : Division Bench

Advocate : Thiru G. Narayanan, for the Appellant; Thiru T. Somasundaram, for the Respondent

Judgement

1. This Writ appeal is directed against the judgment of Mohan, J. dismissing writ petition No. 4122 of 1975 filed by the appellant for the issue of a writ of certiorari to quash the order of the first respondent dated 20-1-1975.

2. The appellant is a manufacturer of safety matches. There was an inspection of his factory on 31-7-1969 and 13-8-1969 when some discrepancies were found in the accounts. One such discrepancy related to the account of Chlorate and use of raw materials such as wax and splints. Another discrepancy related to the consumption of veneers which was higher than the normal consumption during the months of January, February, March and April 1969. From the accounts it was noticed that the appellant had produced 422 gross of matches with 459 Kgs. of chlorate allotted to him for the manufacture of matches. The factory was not working during the months of May to December, 1969. Since the appellant did not satisfactorily account for the use of more chlorate and the higher consumption of veneers, he was called upon to show cause under Rule 173-E of the Central Excise Rules. After getting his explanation and considering the same, the Assistant Collector of Central Excise, Sivakasi exercising his powers under Rule 173-G levied a duty of Rs. 19,935/- as also penalty of Rs. 100/-. Against this order, an appeal was preferred to the Appellate Collector of Central Excise

but without success. Thereafter, the appellant filed a revision before the Government of India which also failed. The appellant then filed the above writ petition seeking a writ of certiorari to quash the order dated 20-2-1975 of the Government of India which in turn affirmed the orders of the Appellate Collector of Central Excise as also the Assistant Collector of Central Excise, Sivakasi, the original authority.

3. In the writ petition the only contention advanced by the appellant was the inspection having taken place on 31-7-1969 and 13-8-1969, the demand for duty and the levy of penalty dated 21-9-1972 issued under Rule 173-E of the Central Excise Rules was time-barred in view of the decision of the Supreme Court in *Public Prosecutor, Madras Vs. R. Raju and Another, etc.,*. The said writ petition was resisted by the respondents herein on the ground that under Rule, 173-E of the Central Excise Rules no time limit is fixed and that for violation of Rule 173-E action could be taken under Rule 173-G and that on the facts of the case the said decisions of the Supreme court has no application.

4. Mohan, J., held that the said decision of the Supreme Court has no application to this case and that in so far as Rule 173-E does not provide for any limitation for initiating action under that provision, action could be taken for violation of Rule 173-E under Rule 173-G at any time. In that view the learned Judge held that the impugned levy is perfectly valid. The said decision of Mohan, J. has been challenged in this writ appeal.

5. According to the learned counsel for the appellant, the learned single Judge has overlooked the provision in Rule 173-J which was in force at the relevant time and which attracts Rule 10 and, therefore, action under Rule 173-G should be taken within the time limit prescribed in Rules 10 and 11. It is not in dispute that action has been taken under Rule 173-E read with Rule 173-G. Rule 173-E provides for the mode of determination of the normal production which can be taken as the norm and if the production shown by the manufacturer falls below the said norm, it is open to the Excise Officers to call upon the assessee to account for the shortfall to their satisfaction and that if it is not properly explained the assessment of duty to the best of judgment can be made after giving a reasonable opportunity of being heard. The said rules is extracted below :

"173-E. Determination of normal production. - (1) Any officer duly empowered by the Collector in this behalf may fix the quantum and period of time when the production of the assessee's factory was considered normal by such officer, having regard to the installed capacity of the factory, raw material utilisation, labour employed, power consumed and such other relevant factors as he may deem appropriate. The normal quantum of production during a given time so determined by such officer shall form the norm. The assessee shall, if so required by the said officer, be called upon to explain any shortfall in production during any time as compared to the norm. If the shortfall is not accounted for to the satisfaction of the said officer, he may assess the duty due thereon to the best of

his judgment, after giving the assessee a reasonable opportunity of being heard.

(2) The officer empowered as aforesaid may revise the norm as determined by him at any time, if after such further enquiry as he may consider necessary, he has reason to believe that any factor affecting the production of the factory, has undergone a material change :

Provided that the norm as determined by the Officer empowered as aforesaid shall not be revised to the disadvantage of the assessee unless such assessee has been given a reasonable opportunity of being heard."

6. Rule 173-J has prescribed the same time limit as in rules 10 and 11 for recovery of short-levy as is determined under Rule 173-E. According to the assessee the inspection took place in the year 1969 and the show cause notice was issued on 21-9-1972 and the norm of production was fixed as part of the impugned assessment on 25-5-1973 and the short levy as determined by the Assistant Collect based on the norm or the normal production in relation to the period between January to April, 1969 will be barred by time in view of rule 173-J read with rule 10. If there is a short levy then as per rule 173-J, rule 10 will stand attracted. Rule 10 provided for a period of three months for recovery of the short levy.

7. The learned counsel for the respondents would, however, say that short levy can arise only if there had been a levy or an assessment, and as in this case no assessment or levy has taken place as the appellant has adopted the self-removal procedure and therefore the amount demanded cannot be treated as an amount short levied and as such rule 10 will not be applicable. In support of the said submission the learned counsel refers to the decision of Natarajan, J. in Binny Ltd. v. Superintendent, Central Excise, Madras - 1979 E.L.T. (J 65) = (1979) T.L.R. 2440, wherein it has been held that rule 10 will not be attracted when differential duty from manufacturer following self-removal procedure is sought to be recovered. In the said decision it was held that :

"there is a difference between levy and assessment and merely because an account current had been kept, it cannot be accepted that a legally valid or completed assessment had taken place. Any payment or collection of tax made on the basis of returns submitted under the self-removing procedure cannot be construed as a completed assessment and, as long as a completed assessment has not taken place, there is no necessity for the department to resort to its powers under Rule 10 for recovery of short-levied duty surcharges. In my opinion, the second contention has been raised solely because the department had committed the mistake of issuing notices under rule 10 and withdrawing them subsequently. The mistake committed by the department is clutched at by the petitioner to project a contention that a completed assessment had taken place and as such, it was entitled to a show cause notice before the differential duty was claimed."

We find from the said decision that there was no final assessment but only a

provisional or tentative assessment of the excise duty on the goods removed as per the cost particulars given by the manufacturer and that later a revised demand was issued on the cost particulars furnished by the manufacturer. Thus that was a case where rule 173-J has not been invoked. In this case, however, self-removal procedure has been adopted and monthly returns have been filed and there has been an assessment. We have perused the returns for the months of January to April, 1969, the period under dispute and the said returns have been accepted and final assessment has been made as seen from the assessment memoranda on the back of the returns. The said assessment memorandum contains the following clauses :

- "1. The assessee has paid the duty on the above goods correctly.
2. The short-levied as indicated above should be paid by the assessee within ten days by debit in his account current (P.L.A.). The assessee is advised to lodge an application for refund for the duty paid in excess as indicated above.
3. Duty on the goods cleared under Gate Pass No. (s) and included in this returns has been assessed provisionally under Rule 9B and provisions of the said rule shall apply for recovery of deficiency in, or refund of excess of duty."

Except clause 1, the other clauses have been struck off. Clause 3 which treats the assessment as provisional under Rule 9B has been struck off. Therefore the assessment should be taken to be a final assessment. Even in clause 1 the expression "except to the extent indicated below" has been struck off. Thus the Central Excise Officers have declared in the assessment that the assessee had paid the duty on the goods removed correctly. In view of the fact that the clause relating to the provisional assessment has been struck off and the assessment has been made final on the returns filed by the assessee for the concerned four months, we have to proceed on the basis that there has been a final assessment and the amount sought to be collected can only be treated as short-levy.

8. The learned counsel for the respondents relies on the decision of a Division Bench of this Court in *Secretary to the Government of India v. Loganathan* 1976 II M.L.J. 295. In that case there was an inspection of the place of manufacture on 28th May, 1965 and on the basis of the discovery of certain shortage, a show cause notice was issued on 21-12-1967. Subsequently an assessment was made on 16th May, 1968. The demand was challenged on the ground that the show cause notice was beyond six months from 28th May, 1965 and, therefore, barred by limitation. The Court rejected the said contention that in the case of excise duty tax is attracted not because the assessee violated some provisions of law, but because he manufactured goods which are assessable to excise duty but escaped charge, and it, therefore, following that once it is clear that violation is not the basis of assessment, the starting point of limitation can only be from the date of the accrual of the cause of action or of an act or an order made under that Act, which in that case was either the proceedings started on 21st December, 1967 by way of show cause notice or later the assessment order

dated 16th May, 1968. The learned counsel for the respondents would rely on the decision of the Bombay High Court in C.C. Industries and others v. H. N. Ray and another 1980 E.L.T. 442 which holds that if the evasion of duty resulted from the suppression of facts by the petitioner the short levy cannot be attributed to inadvertence or error on the part of the Central Excise Officer and, therefore, the demand for differential duty raised after a period of three months as envisaged by rule 10 was not barred by limitation. That was also a case where rule 173-E has not been invoked as in this case. It is not a suppression of facts by the manufacturer but the Excise authorities fixing a different norm after inspection of the manufacturer's account books and taking the average consumption of chlorite and veneers and determined the duty payable under Rule 173-E read with Rule 173-G. We therefore feel that the said decision of the Bombay High Court has no application. The position might be different after rule 173-J has been dated later, but during the relevant period the said rule was there and as per the said rule, rule 10 stands automatically attracted and as per rule 10 the demand should have been made within three months of the date when the duty was charged or paid. In this case the duty was paid in 1969 and the short levy was determined and fixed on 25-5-1973 nearly four years afterwards. We have therefore to disagree with the view taken by the learned single Judge and hold that the impugned levy in this case is clearly time barred. Hence the writ appeal is allowed and the impugned order dated 20-2-1975 will stand quashed. There will, however, be no order as to costs.