

(1983) 07 GUJ CK 0019

In the Gujarat High Court

Case No : Special Civil Application No. 1696 of 1977

Standard Due Chem and Another

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 26-07-1983

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A

Citation : (1987) 14 ECC 125 : (1987) 12 ECR 765 : (1987) 28 ELT 29 : (1983) 53 STC 241

Hon'ble Judges : R.J. Shah, J;B.K. Mehta, J

Bench : Division Bench

Advocate : G.N. Desai, instructed by H.V. Chhatrapati, of Bhaishankar Kanga and Girdharlal, for the Appellant; Haroobhai M. Mehta, for the Respondent

Judgement

B.K. Mehta, J.—Since the only question which survives for our decision is a limited one, we need not trace elaborately the facts which have led to this petition. The question which has become limited for purposes of this petition is on account of the decision of the Government of India in *Re : Western Bengal Coal Fields Ltd.* as contained in Order-in-Revision No. 270 of 1982, dated 26.4.1982, where the Union Government has held, while allowing the revision of the assessee, that the product which the said assessee was manufacturing, namely, Phenol Formaldehyde moulding powder was a product which was entitled to the benefit of the exemption notification No. 122/71 as Phenolic Resins. In order to appreciate, however, the final directions which we are inclined to issue in this matter, a few facts need be noticed.

2. Petitioner No. 1 is a partnership firm manufacturing Phenol formaldehyde moulding powder since 1970 in lump, solid or liquid form. The petitioners contended that their product is Phenolic Resins. Prior to June 1, 1971, this product was excisable under Tariff Item No. 15-A of the Central Excise Tariff read with Notification of the Government of India dated September 23, 1965. On June 2, 1971, the Union Government issued exemption notification No. 122/71 under

which the excise duty was leviable at 15% of the value of the product, namely, Phenolic Resins. By a further notification No. 127/73 dated June 9, 1973, the rate was raised to 18% but this was again reduced to 13.5% by notification No. 49/76 dated March 16, 1976. The excise authorities took out sample product of the petitioners on November 3, 1972 and Chemical Analyser gave report on March 20, 1973 that it was not blended with artificial or synthetic resin and, therefore, it was Phenolic resin. It is claimed by the petitioners that respondent No. 3, herein, who was the Superintendent of Central Excise at Surat at all the relevant times, decided on July 21, 1973 that the product is Phenolic resin and entitle to concessional duty as admissible under notification No. 122/71. The petitioners were asked to file revised price list vide letter of the third respondent dated August 23, 1973 and the petitioners have, in response to the said letter, filed revised price list on September 11, 1973. The petitioners claimed refund of the amount in difference between the duty charged and the duty leviable, which was admittedly at the concessional rate as admissible under the exemption notification. In spite of the opinion of the Chemical Analyser of the Central Excise Department, the excise authorities issued three show cause notices two of which were dated October 26, 1974 and the third one dated February 3, 1975 calling upon the petitioners to show cause why the amount refunded to them under the exemption notification should not be recovered and subjected to excise duty at 40% ad valorem. The petitioners filed their replies to the aforesaid three show cause notices contending, inter alia, that there was no material before the excise authorities to effect a change in their stand which they had hitherto taken conceding the claim of the petitioners and praying for the reasons which weighed with the authorities for the change in the opinion. Since this request for furnishing the reasons was not complied with, by Special Civil Application No. 764 of 1976, the petitioners were compelled to move this court by appropriate writ, order or direction quashing and setting aside the three show cause notices.

3. A Division Bench of this court, consisting of Obul Reddi C.J. and D.P. Desai, J, (as they then were), by its order of June 1977 22 ELT 181 (Guj.) upheld the grievance of the petitioners that the excise authorities erred in law in calling upon the petitioners to pay back the amount refunded to them being the amount of duty at the concessional rate admissible under the relevant notification applicable and the duty at the rate of 40% as prescribed under the relevant tariff entry in the schedule since the grounds on which the show cause notices were issued did not disclose the grounds. The Division Bench, therefore, made the following order on the said special civil application :

"We, therefore, quash the three show cause notices as also the order on the application of the petitioners dated March 5, 1976 asking for refund of differential amount of excise duty on Phenolic Moulding Powder. The respondent would be at liberty to issue fresh show cause notices disclosing the grounds on which they propose to levy excise duty at 40 per cent ad valorem. That the same can be issued by them only in accordance with law and on fresh evidence or material then in existence with the department. If they do not choose to exercise their

right to issue fresh show cause notices within three months from today, the petitioners would be entitled to the refund of the excess amounts collected from them".

4. It appears that after this order was made by the Division Bench in June, 1977, three fresh show cause notices were issued on September 20, 1977. It further appears that in those fresh show cause notices, only one additional fact is mentioned than those set out in the earlier show cause notices which were quashed and set aside by this Court, namely, the statement of the petitioners in their two letters dated November 1, 1972 and December 5, 1982 stating, inter alia, as to what was precisely the manufacturing process and to what industrial use the product was put to. The petitioners had by their letter dated October 3, 1977 called upon respondent No. 3 to furnish them with any fresh material or evidence in the possession of the Department so as to enable the petitioners to show cause effectively, Respondent No. 3, by his letter of November 17, 1977, intimated the petitioners that the show cause notices in question were self-explanatory and there was no question of any additional evidence or material to be furnished to the petitioners as requested by them. The petitioners have, therefore, moved this Court again by the present special civil application for appropriate writ, order and direction quashing and setting aside the said show cause notice.

5. Pursuant to the Rule being issued by this Court, reply affidavit of one Shri N.M. Desai, who happened to be Assistant Director of Central Excise, has been filed on behalf of the respondents to which an affidavit-in-rejoinder has been filed by Shri Pradeep K. Shah who is petitioner No. 2 before us.

6. As stated above, the dispute between the parties hereto lies in a very narrow compass since the principal question which has been raised by the petitioners as to whether their product in question is liable to be subjected to duty at the concessional rate as admissible under the relevant notification, namely, Notification No. 122/71 and other notifications in that behalf has been now concluded by the decision of the Government of India in Order-in-Revision No. 270 of 1982 dated April 26, 1982 where similar product, namely, Phenol Formaldehyde Moulding Powder manufactured by Western Bengal Coal Fields Ltd., was treated as Phenolic Resin and consequently, therefore, entitled to concessional rate of duty as admissible under Notification No 122/71. In paragraph 4 of the said order, which is reported in 1982 Excise Law Times, p. 782, it has been stated as under :-

"4. The Government find considerable force in the petitioner's submissions. Phenol formaldehyde moulding powder which is obtained by chemical reaction of phenolic resin with fillers and other additives for making them fit for a particular use does not cease to be a phenolic resin. Government further agree with the petitioners that the benefit of exemption Notification No. 122/71 is available to all phenolic resins (except blends of phenolic resin with other resins) and that the use of the word "including" in the aforesaid exemption notification could only

have the effect of enlarging the scope of the exemption notification so as to extend the benefit even to phenolic resins which are chemically modified and therefore this provision which has the effect on enlarging the scope of the exemption notification shall not be interpreted so as to restrict the benefit of exemption notification only to so called pure resins."

Having regard to this final pronouncement of the opinion of the Government of India, in exercise of its revisional jurisdiction, we are of the opinion that the fresh show cause notices which have been issued by the respondents are ultra vires their power for the obvious reason that the Division Bench of this Court while disposing of the earlier special civil Application No. 764/76 wherein the petitioners had challenged the earlier show cause notices and while quashing the setting aside the said show cause notices, had directed the Union of India and other excise authorities concerned who were respondents in the said special civil application, to make refund of the excess amount collected from the petitioners subject to the qualified liberty reserved in them to issue fresh show cause notices within a period of three months from the date of the order which show cause notices should be in accordance with law and on fresh evidence on material that might be in existence with the Department. In light of the decision of the Government of India, as set out above, we are of opinion that the part of this qualified liberty reserved in the respondents has not been fulfilled. We must, however, admit that when these fresh show cause notices were issued, the excise authorities had not the benefit of the decision of the Government of India which we have referred to above. None-the-less, when we are called upon today to decide whether the petitioners are entitled to refund, we have to bear in mind the legal position as finally decided upon by the Government of India itself in a similar matter. The result, therefore, is that it cannot be gainsaid that fresh show cause notices were not according to the correct legal principles and they were ultra vires the power of the authorities since this court has, while upholding the claim of the petitioners to the refund of the excess amount collected from them permitted the respondents to issue fresh show cause notices according to the correct legal principles. In view of this, we do not think that it would be open to the respondents to raise the point about the entitlement of the petitioners to claim the refund on the grounds urged in the additional reply affidavit of Shri G.M. Thandani, Assistant Collector (Legal), dated July 5, 1983.

7. The result, therefore, is that this petition is allowed and the impugned show cause notices are quashed and set aside and the respondents are directed to make refund of the excess amount of duty in sum of Rs. 2,86,331.07 paise as claimed by the petitioners subject to liberty to the respondents to obtain appropriate directions in the matter if the amount is, on computation, found to be less than that claimed by the petitioners. The refund should be made at the earliest opportunity but in no case later than 30th November, 1983. Rule is made absolute accordingly with no order as to costs.