

(1987) 12 DEL CK 0007

In the Delhi High Court

Case No : C.W. No. 547/76 and 847/79

Star Paper Mills Ltd.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 17-12-1987

Acts Referred:

Central Excise Rules, 1944 — Rule 10A

Citation : (1988) 34 ELT 542

Hon'ble Judges : P.K. Bahri, J

Bench : Single Bench

Advocate : Daljit Singh and J.S. Kapil and M.S. Vinaik, for the Appellant; S.K. Misra and Atul Chille and S.K. Dube, for the Respondent

Final Decision : Allowed

Judgement

P.K. Bahri, J.—In the first writ petition the petitioner has sought directions for quashing orders dated April 14, 1972, May 17, 1973 and July 30, 1975, of the Assistant Collector-Respondent No. 4, the Appellate Collector-Respondent No. 3 and the Joint Secretary Respondent No. 2 respectively and for directions to the respondents to refund the excess duty paid by the petitioners on the full quantity attributed to the enlargement of capacity as claimed under application dated 5/6th June, 1970.

2. In the second writ petition the petitioner has prayed for quashing the order dated March 2, 1977 and order dated August 20, 1977, made in appeal and order dated March 21, 1979, passed in revision by respondents 4, 3 & 2 respectively and for directions to the respondents to allow the concessional rates in duty as admissible under the Exemption Notification Nos. 163/65 and 208/67 read with Notification No. 21/68.

3. Facts leading to the filing of these two writ petitions are that the petitioner-company is carrying on the business of manufacturing various types of papers and having its factory at Saharanpur (U.P.). The excise duty on the paper for the

first time was levied in the year 1955 and a resident Inspector of Central Excise was posted at the factory of the petitioner with effect from March 1, 1955 and who was in charge of levying and collecting the excise duty of the paper being produced by the petitioner in the aforesaid factory. This duty was being levied at that time under Item No. 17 of the First Schedule to the Finance Act, 1955. up to the year 1964 the production capacity of the petitioner's factory stood at about 22,000 M.T. per year. In 1965 the petitioner took up the expansion programme for increasing the capacity to about 35,000 MT per year by installing new machines and also by effecting renovation of existing machinery. After obtaining requisite import license for importing the machinery and also procuring new machinery locally, the expansion of the capacity of the factory was completed in May, 1968.

4. On October 1, 1965, the Government of India issued Notification No. 163/65-Central Excise, giving certain concessions to the paper manufacturers who have undertaken enlargement of capacity. I would refer to the said notification in detail later on; copy of the said notification is Annexure P/1. On September 8, 1967, another Notification No. 208/67 was issued for exempting payment of duty in respect of first 1000 M.T. of paper cleared for home consumption during any financial year from 75% of the duty of excise provided there was no plant attached to the factory for making bamboo pulp. This notification obviously was issued to encourage production of paper by using the raw material other than bamboo pulp. May be bamboo pulp was not sufficiently available in the country. The said notification is Annexure P/2. On March 1, 1968, Notification No. 21/68-C.E. was issued effecting amendment of the Notification No. 208/67 making it clear that the concessions given in the three notifications would not be available simultaneously in respect of the same production i.e. in case the manufacturer of the paper has availed the concession in respect of first 1000 M.T. of paper cleared in the financial year then the said quantity of paper would be available for concession of 75% of the duty but the same paper would not be entitled for another concession under Notification No. 163/65 which concession was given in respect of the enlarged production of the paper. It is also clear that the base year in order to see whether the petitioner had enlarged the production of the paper was from the month of June-May of every year after May 1968. Annexure P/3 is the third notification dated March 1, 1968. On March 5, 1968, a Trade Notice No. 61/Paper-I/1968 was issued by the Collector of Central Excise explaining the three notifications in detail. Annexure P/4 is the said circular.

5. The petitioner during the year 1969-70 is stated to have manufactured 1719.965 M.T. of paper in excess of the base production and he claimed a rebate of 20% in excise duty of this quantity but the Assistant Collector vide order dated April 14, 1972, rejected this claim of the petitioner on the ground that the petitioner had availed the concession in respect of the first 1000 M.T. of paper cleared during the financial year in respect of notifications Annexures P/2 & P/3 and so the petitioner was entitled to relief under the first notification (Annexure P/1) after excluding 1000 M.T. of paper. It was held that the petitioner was thus

entitled to refund of duty in respect of only 719.965 M.T. of paper under the first notification. Annexure P/5 is the copy of the order. The contention raised by the petitioner is that the concession availed in respect of first 1000 M.T. of paper vide Notification No. 208/67 read with Notification No. 21/68 was obtained even before the excess production was made in that particular year. Hence, the Assistant Collector was wrong in excluding 1000 M.T. of paper from the excess production to which the petitioner was entitled concessional duty in view of the first notification inasmuch as no concession had been obtained under the first notification in respect of the first 1000 M.T. of paper.

6. The petitioner's appeal highlighting these points was, however, dismissed by the Appellate Collector on May 17, 1973. The Collector gave the opinion that the total production included 1000 M.T. of initial production and thus the petitioner could claim concession under the first notification after excluding the production of 1000 M.T. of paper. He directed that the concessional duty if already availed by the petitioner in the year 1970 in respect of 1000 M.T. of paper be recovered from the petitioner and the petitioner is entitled to only concessional duty in respect of excess production in view of the first notification. The grievance of the petitioner is that the Collector has gone wrong because he did not realise that 1000 M.T. of paper cleared in the beginning of the financial year was not part of the excess production for the whole year. The petitioner filed a revision petition highlighting that the petitioner had not availed concessions in respect of both the notifications of 1000 M.T. of paper but the revision petition was rejected vide order dated July 30, 1975. The petitioner had filed first writ petition claiming the relief mentioned by me in the opening of the order.

7. Respondent No. 4 after perusing the order dated May 17, 1973, issued three show cause notices dated February 11, 1974, alleging that duty was recoverable from the petitioner under Rule 10A of the Rules on the paper cleared by the petitioner for the period April 1, 1970 to April 16, 1970; April 1, 1971 to April 14, 1971 and April 1, 1972 to April 18, 1972; in respect of the first 1000 M.T. of paper cleared during each financial year availing concession under Notification No. 208/67 as amended by Notification No. 21/68 as the petitioner was not entitled to have the said concessions inasmuch as the petitioner had already enjoyed the concession under the first notification in respect of his excess production. So, in this way the petitioner was required to pay Rs. 3,15,585.34 P., Rs. 3,15,953.53 P. and Rs. 3,93,170.82 P. in respect of the financial years 1970-71, 1971-72 & 1972-73; copies of the show cause notices are Annexures P/7A to P/7C. The petitioner filed replies to these show cause notices taking the pleas that these demands are time barred as the provision of Rule 10 were applicable which fixed the limitation of six months for recovering the duty which has been short levied due to some erroneous decisions and as the demands were made after the expiry of more than six months, so the demands were barred by limitation. He also took the plea that in fact the petitioner had not enjoyed double benefit in respect of the first 1000 M.T. of paper cleared in each financial year in question as they were not part of the excess production. Hence, he had

rightly been granted concessional duty vide notifications (Annexures P/2 & P/3). The Assistant Collector repelled the objections of the petitioner and confirmed the demands vide his order dated March 2, 1977 with the finding that Rule 10A was applicable wherein no limitation has been provided and also that the petitioner had enjoyed double benefit of concession in duty in respect of 1000 M.T. of paper cleared in each financial year mentioned above. The petitioner's appeals against the order were dismissed on August 20, 1977 and the revisions were also dismissed on February 27, 1979. The petitioner had filed the second writ petition against the said orders.

8. The petitioner has reiterated his pleas which he had taken before the respondents claiming that in fact the petitioner had not enjoyed double concessional duties on first 1000 M.T. of paper cleared in every financial year. According to the petitioner, the petitioner had enjoyed the concessional duty in respect of the said paper in view of the notifications (Annexures P/2 & P/3) and the petitioner was entitled to concessional duty in respect of notification (Annexure P/I) on the enlarged production and the enlarged production did not include the first 1000 M.T. of paper cleared in each financial year. Hence, the petitioner was entitled to concessional duty in respect of the enlarged production achieved every year in addition to the concessional duty available to the petitioner in respect of first 1000 M.T. of paper cleared in every financial year. Both the writs are contested by the respondents and in the counter-affidavits the reasoning given in the impugned orders has been reiterated.

9. It is necessary to make reference to the notifications in question in order to understand the import of the same before applying those notifications to the facts of the case. Annexure P/I notification contains the table which has columns 1, 2, 3, 4, 5(a), 5(b) & 5(c). Admittedly the case of the petitioner falls in columns 5(a), 5(b) and 5(c). It was mentioned in these columns that any factory commencing production for the first time on or after March 1, 1964, or any factory existing immediately before March 1, 1964, whose production capacity has been enlarged and brought into operation on or after March 1, 1964, to the extent such production is attributable to the enlarged capacity would be entitled to concession in duty for the first 12 months to 25% of the duty leviable, in the second 12 months to 20% of the duty livable and in the third 12 months to 15% of the duty leviable. Admitted facts are that the petitioner had achieved the production to the tune of 26,403.765 M.T. of paper during the period prior to the expansion of capacity of its factory. During the period June 1969 to May 1970 the period of 12 months envisaged in the aforesaid notification the petitioner produced 28,123.730 M.T. of paper. So, the petitioner had achieved 1719.965 M.T. of excess production entitling him to the concession of 20% of duty. During the month of April 1970 the petitioner had availed the benefit of 1000 M.T. of paper cleared in view of notifications (Annexures F/2 & P/3). According to the contention raised by the petitioner, the petitioner was entitled to both the concessions available under the said notifications inasmuch as the 1000 M.T. of paper cleared in April 1970 was not part of the excess production inasmuch as

the target of excess production was achieved only in the month of May 1970. In para 11 of the writ petition No. 547/76 the production figures of the year 1969-70 have been given mentioning that there was total production of 2728.710 M.T. of paper in the month of May, 1970. In the whole year June 1969 to May 1970 the excess production was only to the tune of 1719.965 M.T. of paper. So, it is clear as far as the production of the said year was concerned that 1000 M.T. of paper cleared in April 1970 was not part of the quantity of excess production. In the counter these facts have been admitted in respect of production for the year June 1969 to May 1970.

10. Now coming to the second notification (Annexure P/2), exemption from duty to the extent of 75% was made available for the first 1000 M.T. of paper cleared by the manufacturer for home consumption during any financial year. However, clause 2 of the notification laid down that this exemption should not be admissible to a manufacturer who has availed himself of any of the concessional rates of duties admissible under columns 4, 5(a), 5(b) & 5(c) of the table below the Notification No. 163/65. If the notification has remained as it is, obviously the petitioner could not have taken advantage of this notification because the petitioner could get the benefit of either of these two notifications and not of both. However, the third clarificatory notification (Annexure P/3) was issued giving the concession of 75% to 1000 M.T. of paper cleared in the financial year for the first time but clause 2 was modified as follows :

"(2) ...

(a) ...

(ii) the said exemption shall not be admissible to a manufacturer who, in respect of the first 1000 metric tonnes of the said paper, all sorts (for which exemption under this notification is available) cleared during the financial year avails of any of the concessional rates of duties admissible under columns 4, 5(a), 5(b), 5(c) of the table below the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 163/65-Central Excises, dated the 1st October, 1965.

(b) ...".

It is clear from the language of the clause that in respect of the first 1000 M.T. of paper for which concessional duty of 75% is enjoyed, the petitioner cannot avail of any concessional duty on the basis of Notification No. 163/65. So, the crucial question which arose for decision before the authorities was as to whether the petitioner was entitled to the benefit of both these notifications simultaneously and in fact has enjoyed the benefit of the said two notifications in respect of the first 1000 M.T. of paper cleared in each of the aforesaid financial years. It is obvious if the first 1000 M.T. of paper cleared in each financial year was also part of the excess production achieved by the petitioner, then the petitioner could enjoy only concession in respect of the first notification for the said quantity of paper and not benefit of both the notifications simultaneously on the same

quantity of paper.

11. In order to appreciate the point raised by the petitioner it is necessary to make reference to the admitted facts regarding the production of paper achieved by the petitioner in the said three relevant years. It is not disputed that before carrying out the expansion programme in the factory to raise the capacity to produce more paper the petitioner had produced paper to the tune of 26403 M.T. in the base year June 1967 to May 1968. After enhancement of the capacity by installing imported machinery the petitioner achieved the production to the tune of 28123 M.T. of paper for the period June 1969 to May 1970. So, there was excess production of 1719.9 M.T. of paper. Admittedly in accordance with the first notification the petitioner was entitled to 20% rebate in excise duty on this excess production achieved during that period. In accordance with the second and third notifications read together if 1000 M.T. of paper had been cleared for claiming the benefit of concessional duty during" the financial year which admittedly commences in April and that was part of the excess production then the petitioner would not be entitled to benefit of both the notifications simultaneously because that was provided in the notification itself that if benefit in respect of the same paper had been enjoyed in the first notification of 1965 then on the same paper additional benefit cannot be granted in consonance with the second and third notifications. However, the, petitioner has clearly pleaded that after clearing 1000 M.T. of paper in April 1970 for which benefit was taken in the second and third notifications the petitioner managed to achieve the excess production of 1719.9 M.T. only in the month of May 1970 meaning thereby the benefit of first notification was not enjoyed by the petitioner in respect of 1000 M.T. of paper first cleared in April 1970. Hence, the petitioner was entitled to benefit of these notifications simultaneously because it pertained to different paper produced by the petitioner.

12. Similarly for the year 1970-71 the petitioner had achieved enhanced production to the tune of 3785.8 M.T. of paper. He had clearly mentioned in his grounds of appeal at page 61 of the paper book that the said increased production was achieved during the period beginning from April 20, 1971 onward whereas concessional duty in respect of 1000 M.T. of paper in accordance with second and third notifications was enjoyed by the petitioner prior to April 20, 1971, in between the period April 1, 1971 and April 14, 1971. So it was made clear that benefit of first notification had not been enjoyed in respect of 1000 M.T. of paper cleared in between April 1 and April 14, 1971 because by that time the petitioner had not become entitled to enjoy the benefit under first notification as he had not achieved the excess production envisaged in the said notification till after April 20, 1971.

13. In respect of 1971-72 as is evident from the pleas taken at page 67 of the paper book the petitioner had achieved the enhanced production of 5721.5 M.T. of paper with effect from April 18, 1972 onward while he has cleared 1000 M.T. of paper in between April 1, 1972 and April 18, 1972 and had enjoyed the

concessional duty benefit in accordance with second and third notification and that paper was not part of the enhanced production which target was achieved after April 18, 1972. These facts have not been disputed before me. However, counsel for the respondent has vehemently argued that for achieving the enhanced production the petitioner has installed the necessary machinery and the whole capacity was used for production of paper throughout the years in question and so it cannot be urged that no part of the enhanced production was achieved prior to the dates given by the petitioner of each year and so the petitioner was entitled to have benefit only in the first notification and not in the subsequent notifications (Annexures P/2 & P/3). If this argument of the learned Counsel for the respondent is to be accepted then it would mean that the authorities did not have the intention to give benefit of concessional duty simultaneously to a particular factory in respect of these notifications. But that is not the position as the language used in the notifications which has been reproduced by me earlier leaves no room for doubt that a particular factory can enjoy the benefit of concessional duty simultaneously in respect of these notifications and only exception is that if the benefit has been enjoyed in respect of particular production of paper then second benefit cannot be made available on the same quantity of paper. That is the only reasonable interpretation possible in respect of the said notifications. I have gone through the impugned orders made at different levels by the respondents and I find that they had not given any reasons as to why the said notifications should not be interpreted in the manner sought to be interpreted by the petitioner keeping in view the facts brought on the record by the petitioner in respect of the production levels achieved by the petitioner at different points of time. After all even if the petitioner had installed more machines to have a capacity for larger production than the production level achieved in the base year prior to enhancement of the capacity to produce more and factually the petitioner is not able to produce the paper more than what has been produced in the base year, the petitioner would not be entitled to concessional duty as envisaged in the first notification. It is quite clear from the reading of the first notification that the concessional duty could be availed of only to the extent of enhanced production of the paper. So, unless and until production actually is enhanced in a particular year from what it was in the base year the concession of duty given in first notification cannot be made available to the petitioner. So, it is only in respect of the enhanced production that the concessional duty is to be granted in consonance with the first notification and that level of enhanced production was achieved by the petitioner in the relevant years after he had already cleared 1000 M.T. of paper in each financial year in the beginning. So, I come to the conclusion that the petitioner was entitled to have benefit of concessional duties in respect of all these notifications in the relevant years keeping in view the production levels achieved by the petitioner, as mentioned above, in particular months of each year.

14. So, on merits the demands in question which are subject matter of writ petition No. 847/79 are liable to be quashed and the petitioner is entitled to

refund of duty wrongly paid by him as claimed in writ petition No. 547/76.

15. Another point which has been raised in seeking to set aside the impugned demands and orders in writ petition No. 847/79 is that the demand notices had been issued by the authorities beyond the period of limitation. Rule 10, as it stood unmodified, of the Central Excise Rules, 1944, it has been provided :

"Rule 10. Recovery of duties not levied or not paid, or short levied or not paid in full or erroneously refunded. - (1) Where any duty has not been levied or paid or has been short levied or erroneously refunded or any duty assessed has not been paid in full, the proper officer may, within six months from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid, or which has been short-levied, or to whom the refund has erroneously been made, or which has not been paid in full, requiring him to show cause why he should not pay the amount specified in the notice. ..."

Rule 10A reads as follows :

"Rule 10A. Residuary powers for recovery of sums due to Government. - (1) Where these Rules do not make any specific provision for the collection of any duty, or of any deficiency in duty if the duty has for any reason been short-levied, or of any other sum of any kind payable to the Central Government under the Act or these Rules, the proper officer may serve a notice on the person from whom such duty, deficiency in duty or sum is 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) ..."

16. If the demand notices are covered by Rule 10, then obviously they are beyond limitation because they have been issued after expiry of more than six months from the relevant date. If they are covered by Rule 10A then they admittedly are within time because no period of limitation has been prescribed in Rule 10A. It is obviously a case of short levying of duties due to some erroneous interpretation of the notifications by the officers concerned of the respondents. The petitioner has been admittedly filling up necessary forms which used to be checked by the officers of the respondents and it is not the case that the petitioner had concealed any material facts before claiming the benefit of concessional duty under the aforesaid notifications. On facts I have already come to the conclusion that the petitioner was entitled to benefit of both the notifications and he has not made any concealment of facts from the respondents. Hence, Rule 10 covers the case of the petitioner. Rule 10A would apply if duty has been short levied due to some concealment of facts by the petitioner. Thus, Rule 10A is a residuary power. . If the particular case is covered by Rule 10, then Rule 10A would not apply. In *N.B. Sanjana, Assistant Collector of Central Excise, Bombay and Ors v. The Elphinstone Spinning & Weaving Mills Co. Ltd.*, 1978 (3) ELT 399, these particular Rules came up for consideration and it was held that Rule 10A would not apply when a short levy is

made through error or misconstruction on the part of an officer, as such a case is specifically covered by Rule 10. In the cited case the officers concerned had allowed the petitioner to remove the goods mentioning that no duty is payable on those goods. Later on it was discovered that officers had wrongly allowed the goods without payment of duty by misinterpreting the Rules. The Supreme Court clearly held that such a case fell in Rule 10 and Rule 10A would not apply. Our High Court also took similar view in *Sulekh Ram & Sons v. Union of India and Ors*, 1978 (50) ELT 525. In *Universal Autocrafts Pvt. Ltd. v. Union of India and Anr.*, 1987 (3) ELT 912 (Bom.), the Bombay High Court also had given the opinion that Rule 10 would cover such cases of short levy of duties. The period of limitation could be considered extended only in cases where there has been fraud, collusion or willful mis-statement or suppression of facts. Such is not the case here. So, these demands are also barred by limitation.

17 In view of the above discussion, I allow both the writ petitions and make the rule absolute and in writ petition No. 547/76, I quash the impugned orders and I direct the respondents to refund the duty as claimed in the petition and in writ petition No. 847/79, I quash the impugned demands and orders. Bank guarantee furnished by the petitioner be released and the amount already deposited by the petitioner in pursuance to the interim orders be also refunded. Keeping in view the legal question involved, I leave the parties to bear their own costs in both the writs.