

(1982) 09 OHC CK 0002

In the Orissa High Court

Case No : Original Jurisdiction Case No. 783 of 1982

Straw Products Limited

APPELLANT

Vs

Factory Officer, Central Excise and Others

RESPONDENT

Date of Decision : 27-09-1982

Acts Referred:

Citation : (1983) 3 ECR 222 : (1986) 23 ELT 70

Hon'ble Judges : R.N. Misra, C.J.;J.K. Mohanty, J

Bench : Division Bench

Advocate : B.K. Mohanty, P.K. Misra and S.P. Choudhary, for the Appellant; The Central Standing Counsel, for Central Government, for the Respondent

Judgement

R.N. Misra, C.J.—The petitioner, a public limited company, carries on business of manufacture of paper and paperboards of different types and qualities at its mill located at Jakaypur in the District of Koraput within the jurisdiction of this Court. The petitioner is a licensee under the Central Excises and Salt Act, 1944 (hereafter referred to as the "Act"), and the Rules made thereunder, for the manufacture of paper and paperboards. One of the items of paper manufactured by the petitioner is machine-glazed poster paper used for printing purposes. Item 17 of the First Schedule to the Act contains the relevant provision prescribing the duty for paper and paperboards. Sub-item (1) of item 17 covers uncoated and coated printing and writing paper (other than poster paper) and the rate of duty is 25 per cent ad valorem. Sub-item (2) is with reference to paperboard and all other kinds of paper...not elsewhere specified. The petitioner being under the impression that item 17(2) was applicable in respect of poster paper, went on paying duty at the prescribed rate until November, 1980, when it came across a Division Bench decision of Gujarat High Court in the case of Darshan Hosiery Works v. Union of India and Ors. (1981) 22 GIR 533 delivered in April, 1980, which was first published in August, 1980, in Excise Law Times (1980 E.L.T. 390). The petitioner thereafter started contending that poster paper was not exigible to any duty from 15th March, 1976, when item 17 in the form referred

to came into the statute book until 19th June, 1980, when an explanation was added to item 68. After coming to know of the decision of the Gujarat High Court, the petitioner submitted a revised classification list by contending that the mistake has been discovered and also claimed refund in respect of duty already paid. The opposite party No. 1, Factory Officer, returned the revised classification list on the ground that the classification list already approved was in force. He also returned the refund application on the ground that the revised classification list having not been approved, there was no scope for claiming any refund. In June, 1981, the petitioner preferred an appeal and asked for stay of payment of duty. On 24th June, 1981, the following order of the Appellate Collector was communicated to the petitioner, vide annexure 10 :

"On preliminary reading of this petition and the appeal petition, their request to stay the order of the Assistant Collector declining to approve the revised classification list No. 2/80 of the appellants is rejected with direction to the Assistant Collector that he has to approve the classification list as per his best judgment. The Factory Officer is also directed to receive the refund claim of the appellants and send it to the competent authority after due process for decision."

The petitioner submitted the revised list as also the claim for refund and as no orders were passed, kept on reminding the authorities by letter, telegram and representation. When no action was taken in spite of lapse of nine months, this writ application was ultimately filed on 21st April, 1982.

2. The petitioner has in this application asked for, inter alia, a direction for approval of the revised classification list dated 27th October, 1980, and has also sought for the issue of a writ of mandamus requiring the opposite parties to refund a sum of Rs. 3,06,47,636.78 and Rs. 8,42,222.51 as detailed in paragraph 19 of the petition said to have been paid under mistake though no duty was at all payable and for passing other consequential orders.

3. The petitioner contends that poster paper was excluded by item 17(2) of the First Schedule and having been excluded under that item, it did not come under any other item in the Schedule. That is the view taken, it is submitted, by the Division Bench of the Gujarat High Court in the decision referred to above, and the opposite parties accepted the ratio of the decision and introduced an explanation under item 68 with effect from 19th June, 1980, to make poster paper liable at the rate shown therein.

4. Return has been made to the rule nisi and several objections have been raised to the claim of the petitioner. It has also been contended that the petitioner's liability was in terms of item 17(2). The petitioner has filed a rejoinder.

5. When the matter was called for hearing, we suggested to the counsel for the petitioner that it would be proper that instead of going into the question raised in the writ application we should direct that the order made under annexure 10 by the Appellate Collector should be implemented within a time to be fixed by us. In case the order of the Appellate Collector is implemented, the question of

accepting the revised classification list submitted by the petitioner in November, 1980, can be examined and decided. Simultaneously, the claim for refund can also be scrutinised and disposed of. The petitioner's learned counsel, however, did not accept our suggestion and advanced arguments in support of the stand taken in the writ application that the petitioner was not liable to any duty in respect of poster paper between March, 1976, and November, 1980. The duty deposited with the opposite parties was under a mistake and the same was refundable. He also maintained that with effect from June, 1980, when the explanation to item 68 was added, the petitioner's liability for poster paper should be in accordance with the residuary rate prescribed against that item.

6. We have examined the Division Bench decision of the Gujarat High Court in *Darshan Hosier Works Vs. Union of India*, . The Court was considering item 22D of the First Schedule of the Act and if there was any liability in respect of banians and janghias under item 68. The expression "not elsewhere specified" occurring in item 68 of the First Schedule came for interpretation. The Court held :

"On first principles, it is difficult to imagine that what has been expressly excluded from taxability under item 22D is included in the residuary item as if the Parliament wanted to do did it by back door. The language of item 68 also does not permit us to adopt the construction which Mr. Vakil has advanced before us and according to which, whatever is not specified in the preceding items or whatever has been specified therein for exemption is included for taxability in the residuary item. The expression which has been used in item 68 is "not elsewhere specified". Does this expression mean "not elsewhere specified" for the purpose of taxability, or does it mean "not elsewhere specified" either for the purpose of taxability or for the purpose of exemption ? In our opinion, the simple expression "not elsewhere specified" which the Parliament has used in item 68 means total omission or failure to specify either for the purpose of taxability or for the purpose of exemption from taxability. Once an article or goods are found specified in any of the preceding entries irrespective of the purpose for which they are specified, item 68 does not come into play and does not render such goods taxable."

It is on this analogy that it has been contended on behalf of the petitioner that once item 17(1) excludes poster paper, it cannot be deemed to have been included in item 17(2). Some support is available from the ratio of the Gujarat decision, but it is not a case which covers the entire field and can be taken to be on all fours for our purpose.

7. We are of the view that instead of our deciding the question outright, we must leave the question to be examined by the statutory authority to whom the appellate direction has been given. We are not impressed with the argument advanced on behalf of the petitioner that there is any prejudice in the mind of the statutory authority and since the amount involved is very heavy no fair decision can be expected from the statutory authority. The statute confers power on the prescribed authorities and it is within their domain to determine disputes

which arise between the rate-payer and the department. This is not a case where there has been any determination. The petitioner had voluntarily paid the amount now claimed as refund and it has been asserting that it is on account of mistake. Whether payment was made under mistake or not is a mixed question of fact and law.

8. As we have already indicated, there has been a direction by the appellate authority to a statutory to do his duty. We do not think it would be appropriate at this stage to cut matters short by imposing a decision on the defaulting statutory authority. On the other hand, we think the departmental discipline would be better maintained if the authority to whom the appellate direction has been given is called upon by mandamus to discharge his duty. There have been series of authoritative pronouncements of the Supreme Court that where payment has been found to be on account of mistake, there is no plea of estoppel and the State cannot exact from a citizen anything which is not due under the law and if the citizen out of mistake or not knowing his liability has parted with any money, the State would not be entitled to keep it. If the amount is one which is not due under the statute, a claim for refund would not be governed by the special limitation provided by the statute and would be governed by the general law of limitation, namely, a period of 3 years from the date of discovery of the mistake. A host of authorities were cited before us and we are sure when opportunity is extended to the petitioner in the matter of disposal of its petition by the competent authority, these decisions would be cited. Since the law of the land is certain on these points, by decisions of the highest court in the country and these are binding on every one, we are sure the statutory authority will act in a fair way, follow the law and come to its conclusions. Similarly, in regard to the acceptance of the revised classification list, the question would be determined.

9. In these circumstances, instead of our deciding the matter finally, we are inclined to take the view that a writ of mandamus should be issued to the opposite party No. 4 either by himself or through the opposite party No. 3, Assistant Collector, to have both the aspects, namely, the acceptance of the revised classification list and the claim for refund, determined within three months from the date of communication of the writ. There has been sufficient delay in complying with the direction under annexure 10. Therefore, without applying for any further extension, our direction should be complied with peremptorily. Full opportunity should be given to the petitioner to be heard and to establish its claim. Since this writ application was necessitated on account of default in compliance of appellate directions, we are of the view that the petitioner is entitled to costs of the proceeding. The writ application is accordingly allowed with costs.