

(1971) 08 DEL CK 0025
In the Delhi High Court
Case No : Civil Writ No. 1310 of 1970

Sulekh Ram and Sons

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 25-08-1971

Acts Referred:

Citation : (1978) 2 ELT 525

Hon'ble Judges : V.S. Deshpande, J

Bench : Single Bench

Final Decision : Allowed

Judgement

V.S. Deshpande, J.—The precise nature of the incidence of the Excise Duty and the appropriate manner of recovery of unpaid Excise Duty under the Central Excises and Salt Act, 1944 hereinafter called the Act and the Rules and the Notifications issued there under have to be considered in this case.

2. The excisable goods are enumerated in First Schedule to the Act and the rate of duty is stated against each item therein. Section 3 of the Act levies the duty in such manner as may be prescribed by the Rules and the Notifications laying down the procedure for the imposition of the duty and the collection thereof. Briefly, the duty of excise is levied on goods and not on a person. But it is levied on the process of producing or manufacturing the goods. Its incidence on the goods Therefore, falls on the stage at which the goods are in the possession the producer or the manufacturer. The goods cannot be removed out of his possession without the payment of the duty. To ensure this, Rule 9(1) lays down that no excisable goods shall be removed from any place where they are produced or manufactured until the Excise Duty livable thereon has been paid at such a place and in such a manner as is prescribed in these Rules and except on the presentation of an application in the proper form and on obtaining the permission of the proper officer on the form. Exceptionally, a Statute and the Rules framed there under may provide that the incidence of the Excise Duty is to fall not on the producer or the manufacturer but on the consumer or the

purchaser after the goods have been removed from the possession of the producer or the manufacturer by sale etc. But this is not such as exceptional case.

3. The goods in question are manufactured out of iron ore. At an early stage of such manufacture iron ore is turned into steel ingots which are Item No. 26 of the First Schedule. The second stage consists of making of rails. The Hindustan Steel Limited made such rails of two kinds namely (1) Those suitable for the laying of rail tracks and (2) those suitable for other purposes such as general fabrication work and re-rolling. The rails suitable for laying rail tracks for the Railways were not dutiable but other rails used for re-rolling were dutiable in the hand of the Hindustan Steel Limited. Section 37 empowers the Central Government to frame rules to carry into effect the purposes of the Act. Section 38 says that all Rules and Notifications issued under the Act shall have effect as if enacted in the Act. Rule 8 empowers the Central Government to exempt by notification any excisable goods from the whole or part of duty livable on them. In exercise of this power the Ministry of Finance (Department of Revenue) Notification Central Excise No. 206/63, dated 30.11.1963 was issued by the Central Government exempting from payment of Excise Duty the iron and steel products falling under sub-item 1 (a) of Item No. 26AA of the First Schedule of the Act made from "re-rollable scrap" on which the appropriate amount of Excise Duty has already been paid. The Hindustan Steel Limited offered to sell untested rails fit for "re-rolling" (as distinguished from laying of railway tracks).

4. These were purchased by the petitioner who manufactured out of them bars and rods on which duty was payable under sub-item 1 (a) of Item No. 26 AA of the First Schedule. The re-rollable scrap was liable to payment of duty in the hands of Hindustan Steel Ltd. as it was not fit for laying of Railway tracks. According to the system of the levy and collection of Excise Duty under the Act and the Rules, such re-rollable scrap could not have been removed from the possession of the Hindustan Steel Ltd. without payment of the Excise Duty. Relying on the working of this system the Excise authorities issued instructions to the users of the re-rollable scrap that they need not follow the usual procedure under Rule 9(1) of the Rules. According to this procedure the bars and rods made out of the re-rollable scrap could not have been removed from the possession of their makers until Excise Duty livable thereon was paid and except on presentation of an application in the proper form and obtaining the permission from the proper officer on the form. In view of the exemption, the officer would have made Nil assessment on such form called AR 1. The Excise Authorities apparently thought that such a mere formality could be safely dispensed with. Accordingly, the bars and rods manufactured by the petitioner were allowed to be disposed of by it as an exempted article without payment of Excise Duty without the application and the Nil assessment under Rule 9 (1).

5. Subsequently, the Authorities discovered that the Hindustan Steel Limited had not paid Excise Duty on the re-rollable scrap which was not fit for the laying

Railway tracks even though the said re-rollable scrap was liable to pay such duty. The authorities thereupon issued a notice of demand to the petitioner asking it to pay the Excise Duty on bars and rods as stated in the First Schedule against sub-item i (a) of Item No. 26AA. As the Duty on ingots had already been paid they deducted that duty from the demand. The petitioner protested against the demand on various grounds enumerated in Annexure P 9 to the Writ petition addressed to the Assistant Collector, Central Excise. Briefly, it contended that the bars and rods manufactured by it at the third stage were exempted from duty. If the re-rollable scrap manufactured by the Hindustan Steel Limited at the second stage were liable to duty then the duty should be recovered from the Hindustan Steel Limited. But this is" no reason why the benefit of the exemption should be denied to the petitioner.

6. The Assistant Collector in his order dated 9-8-1967 at Annexure P 10 to the writ petition admitted that the petitioner manufactured goods falling under Item No, 26AA (i) (a) out of re-rollable scrap. But, according to him, it was a condition of the exemption that the raw-materials from which these goods were manufactured by the petitioner should have discharged the full liability of the end product duty. Hindustan Steel did not pay the duty on the re-rollable scrap and, Therefore, the petitioner was not entitled to the exemption from payment of duty on bars and rods. He purported to recover the duty under Rule 10A. The petitioner appealed to the Collector Central Excise, who dismissed the appeal on 25-11-1968 as per Annexure P 12 to the writ petition purporting Under Rule 9 (2) of the Rules. The revision to the Central Government was dismissed on 29-7-1969 without mentioning the particular Rule under which duty was sought to be recovered from the petitioner.

7. In this writ petition it is contended that the demand of the duty from the petitioner is illegal in as much as the products manufactured by the petitioner is illegal in as much as the products manufactured by the petitioner were entitled to exemption from Excise Duty and the exemption could not be denied to the petitioner on the grounds that the re-rollable scrap from which the petitioner manufactured bars and rods had not been assessed, to Excise Duty in the hands of tire Hindustan Steel Limited though it was so liable. The writ petition is resisted by the Union of India and by the Excise Authorities on the ground that the petitioner was entitled to exemption from payment of the Excise Duty only if the Excise Duty had been recovered on the re-rollable scrap from the Hindustan Steel Limited. The exemption not being available to the petitioner the Excise duty on the bars and rods manufactured by the petitioner could be recovered now under Rule 9 (2) of the Rules.

8. The questions for decision, Therefore, are as follows :-

1. Whether the bars and rods manufactured by the petitioner were exempted from payment of Excise Duty livable under Item No. 26AA (a) of the First Schedule in view of the Notification No. 206/63, dated 30.11.1963 ?

2. If not, are the respondents now entitled to recover the said Excise Duty from the petitioner ? If so, under what law ?

9. The answer to question No. 1 depends on the correct construction of the language of the Notification No. 206/63. The crucial words are "re-rollable scrap on which the appropriate amount of Excise Duty has already been paid". It is admitted that the goods manufactured by the petitioner were made from re-rollable scrap. It is asserted by the respondents that the duty of excise on this re-rollable scrap had not actually been paid by the Hindustan Steel Limited. As the petitioner has no knowledge, whether the Hindustan Steel Limited paid the duty or not, the assertion of the respondent may be taken to be true. On the one hand the respondent urged that it is for the petitioner to prove that the goods manufactured by it were entitled to the exception. To do so he must show that the goods were covered by the language of the notification. According to the respondent the exemption was conditional. The condition was that the Excise Duty should actually have been paid on the re-rollable scrap before the exemption applied to the goods manufactured by the petitioner, Shri Brijbans Kishore, the learned counsel stressed the words "has already been paid". According to him the word "already" in this context means "actually." On the other hand, it is arguable for the petitioner that the words "has already been paid" are a part of the description of the goods which are entitled to be exempted and that this is not a condition precedent to the obtaining of benefit of exemption.

Shri Daljit Singh, learned counsel for the petitioner relies upon the decision of the Supreme Court in *N.B. Sanjana, Assistant Collector of Central Excise, Bombay and Others Vs. The Elphinstone Spinning and Weaving Mills Company Ltd.*, and the other decision in *Gursahai Saigal Vs. Commissioner of Income Tax, Punjab*, referred to therein. In the first decision the word "paid" in the Rule 10 was construed to mean "ought to have been paid" on the ground that it was used mainly to indicate the starting point of limitation of three months prescribed in Rule 10. Similarly, in the second decision the word "paid" was held to mean "ought to have been paid" because the intention in using the word was to indicate the point of time from which interest could be calculated, On the same analogy it is arguable that in the present case the intention being the use of the word "already" is to indicate the prior stage at which the duty was payable and, Therefore, the word "paid" in the Notification also would have been "ought to have been paid". To understand this reasoning better, it is necessary to consider the precise nature of the incidence of the Excise, Duty. Section 3 of the Act levies the duty on goods and not on person. But it qualifies the goods as those "which are produced or manufactured" in India. That is to say that the duty is leviable on goods produced or manufactured and not on other goods, It further states that the duty is to be collected "in such a manner as may be prescribed"

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The manner is laid down inter alia, in Rule 9 (1) which says that no excisable

goods shall be removed from any place where they are produced or manufactured until Excise Duty livable thereon has been paid at such "place and in such manner as is prescribed and except on proper form, and obtaining the permission of the proper officer on the form. More detailed provisions are contained in Chapter V of the Rules. Under Rule 43, the manufacturer has to give a notice to the Collector before commencing the manufacture of the Excisable goods. Under Rule 44, the Collector may require the manufacturer to make prior declaration of the factory premises in which the goods are to be manufactured. Under Rule 46, the premises are marked by the Collector. Under Rule 47, the goods may be stored in these premises prior to the payment of the duty. Under Rule 48, the manufacturer shall execute a bond for the payment of the duty, Rule 49 says that duty shall be chargeable only on the removal of the goods from the factory premises. Under Rule 50 even non-excisable goods can be removed only with the permission of the Collector. Rule 51 provides for the packing and weighment of the goods on which duty is to be levied.

10. Rule 52 lays down, the procedure for payment of duty after which the permission to remove them would be granted by the Collector. Under Rule 52A, a gate pass has to be issued by the Excise Authorities to be manufacturer for removal of the goods from the factory. These provisions make it clear that even though the excise duty is not assessed on a person but no goods still the duty assessed on the goods have to be paid by the producer or the manufacturer before the goods are allowed to be removed from the premises of the producer or the manufacturer. This was why it was held in *The Jiyajeerao Cotton Mills Ltd. Vs. State of Madhya Pradesh*, by the Supreme Court that the taxable event with respect to a duty of excise is "manufacture" or "production" and not "consumption". In *Chhotabhai Jethabhai Patel and Co. Vs. The Union of India and Another*, the nature and incidence of Excise Duty was extensively discussed in the light of the Indian and Foreign decisions. Note was taken of the Federal Court decision AIR 1939 1 (Federal Court) holding that though the primary and fundamental meaning of an Excise Duty is that it is a tax on articles produced and manufactured yet "there is no reason in theory why Excise Duty should not be imposed even oil the retail sale of an article if the taxing Act so provides" But as observed by the Lord Simonds in AIR 1945 98 (Privy Council) consistently with this decision (of the Federal Court referred to above) their Lordships are of opinion that a duty of excise is primarily a duty levied on a manufacturer or producer in respect of the commodity manufactured or produced". It was held, Therefore, that the duty of excise could be levied on the manufacturer retrospectively even after he had parted with the goods and he would have no opportunity to include the Excise Duty in the price of the goods which he had already Sold.

11. We may Therefore, conclude that according to the procedure laid down in the Act and the Rules for the levy and collection of the Excise Duty, the incidence of the Excise Duty is on the manufacturer or the producer and not on the person to whom the manufacturer or the producer sells the goods in much as such a

purchaser is in the position of a consumer vis-a-vis the manufacturer. In the present case, Therefore, the incidence of the Excise Duty on re-rollable scrap was on the Hindustan Steel Ltd., who manufactured it and not on the petitioner who purchased it.

12. If the Excise Duty on the re-rollable scrap was payable only by the Hindustan Steel Ltd., namely the manufacturer and never by the petitioner, namely, purchaser what would be the meaning to be attached to the word "already" in the Notification granting the exemption ? If this word is used to mean "actually" then the exemption would not be available to the petitioner in the present case. Such a construction would, however, be contrary to the system of recovery and levy of Excise Duty under the Act and the Rules. This system secures that in all cases Excise Duty is recovered from the manufacturer before the goods are removed from the factory premises. Purchaser of goods from such a manufacturer are entitled to rely upon the system and to presume that the duty had already been recovered from the manufacturer. The exemption authorities issued instructions to purchasers of re-rollable scrap that goods manufactured by such purchasers from re-rollable scrap could be removed from the premises of such purchasers without observing the procedure prescribed by Rules"9 (1).

13. It would be intolerable if the purchasers of manufactured goods were to be required to ascertain whether Excise Duty on the manufactured goods had already been paid by the manufacturer before the sale of such goods or not. Purchaser would have no means of knowing it. Hundreds and thousands of purchasers of such goods are made and in no case can any attempt be made by the purchaser to know this fact from the manufacturer. This is why the Excise Authorities allowed the petitioner and other persons manufacturing goods from re-rollable scrap to remove their goods from their premises without following the procedure under Rule 9 (1) and without payment of duty under Item No, 26 AA (ia) of the First Schedule. In view of this context it would be proper to construe the words "already paid" to mean that the Excise duty must have been paid at a prior stage or ought to have been paid at a prior stage. They do not mean that the Excise Duty was actually paid at a prior stage.

14. Nor can it be said that there could be any uncertainty about the liability of the re-rollable scrap in the hands of the Hindustan Steel Ltd. There was a clear distinction between rails usable for Railway tracks and other rails. The former first class or better rails used for an important purpose and hence exempted from duty. The latter were second class rails used for a less important purpose and hence not exempted from payment of Excise Duty. The specifications of these two kinds of rails must have been different. There was, Therefore, no difficulty either for the Hindustan Steel or for the Excise Officers to levy duty on latter and exempt from duty the former kind of rails. In this context, Therefore, I would construe the notification exempting the goods manufactured by the petitioner should have been such on which the goods were manufactured by the petitioner should have been such on which the proper amount of duty of excise

ought to have been paid at a stage prior to the use of the re-rollable scrap by the petitioner. The exemption was, Therefore, available to the petitioner even if by the mistake of the Hindustan Steel and/or of the Excise Officer, the duty on re-rollable scrap had not actually been paid by the Hindustan Steel and recovered by the Excise Officers.

15. Let us consider the second question on the assumption that the benefit of exemption was not available to the petitioner. The first result of this would be that re-rollable scrap from the Hindustan Steel Ltd. who were liable to pay it (sic.). Absolutely no Explanation is given by the respondent why the duty was not recovered from the Hindustan Steel as soon as they came to know that it had not been paid by the Hindustan Steel. The inference is obvious. The Excise Officers concerned allowed the re-rollable scrap to be removed from the premises of the Hindustan under some inadvertence, error, collusion or mis-construction on the part of some officer or through mis-statement as to the description of the goods on the part of the Hindustan Steel. If so, the description be recovered from the Hindustan Steel only under Rule 10. But R. 10 can be resorted to only within the prescribed limitation of three months from the date on which the duty was payable. The limitation must have expired before the Authorities became aware of the fact that the duty had not been paid. Their Lordships of the Supreme Court have already held in N.B. Sanjana's case (Supra) that Rule 10A could not be applied to a case to which Rule 10 was applicable inasmuch as Rule 10A was a residuary rule. Rule 9 could not be applied for the recovery of the duty from Hindustan Steel as there was no possibility of the re-rollable scrap being clandestinely removed from the factory of the Hindustan Steel which is a respectable Government Undertaking. This is why the respondent has sought to recover the duty from the petitioner.

16. But the respondents met with the same difficulties in recovering the duty from the petitioner. The Assistant Collector at first thought that the duty should be recovered under Rule 10A while the Collector thought that the duty should be recovered under Rule 9 (2). In view, none of these two rules are available to the respondents for the recovery of duty from the petitioner on goods manufactured by the petitioner and falling under Item No. 26AA (ia) of the First Schedule. The broad distinction between Rule 9 (2) and Rule 10 is as follows :

17. Rule 9(1) requires that the manufacturer or the producer should make the necessary application for the permission to remove the goods from his premises after payment of duty. The Excise Authorities had dispensed with the making of such an application by the petitioner and other manufacturers of the exempted goods as this was a needless formality. The goods were removed from the premises of the petitioner with the knowledge and the consent of the Excise Authorities. The Excise Authorities had full opportunity to levy and collect duty on these goods if they wanted to do so. Rule 9 (1), Therefore, applies only where the goods are removed with the knowledge and consent of the Excise Authorities from the premises of the manufacturer. It is only when Rule 9 (1) is contravened

and the goods are removed clandestinely without the knowledge and consent of the Excise Authorities that the penal consequences envisaged by Rule 9 (2) would ensue. Not only is the duty recoverable under Rule 9 (2) but a penalty is also livable and the goods are liable to be confiscated. This is why their Lordships of the Supreme Court in *N.B. Sanjana, Assistant Collector of Central Excise, Bombay and Others Vs. The Elphinstone Spinning and Weaving Mills Company Ltd.*, , held that Rule 9 (2) applies to clandestine removal of goods. It cannot apply to removal of goods with the knowledge and consent of the authorities. It is true that in *N.B. Sanjana's* I case the petitioner had made an application under Rule 9 (1) and the Excise " Officer had assessed the goods to "Nil" duty.

But in the present case it was not done only because the authorities had issued circulars that this formality should be dispensed with. It is admitted in the written statement that the goods were cleared with the knowledge and consent of the authorities and were not clandestinely removed. The respondents cannot, Therefore, seek to recover duty from the petitioner in this case under Rule 9 (2). There is an additional reason why Rule 9 cannot apply. It applies only to "excisable goods". The definition of "excisable goods" u/s 2(d) of the Act is "goods specified in the First Schedule" as being subject to duty of excise. The goods manufactured by the petitioner were excisable goods before the issue of Notification No. 206/63 exempting them from payment of duty. The Notification was issued under the Act. According to Section 38. Rule 8 as well as the exemption Notification "shall have effect as if enacted in this Act". In *Kailash Nath and Another Vs. State of U.P. and Others*, the Supreme Court observed that an exemption granted in pursuance of a notification issued under the U.P. Sales Tax Act was considered as having been contained in the parent Act itself. This observation is not affected by the fact that on another point namely, the maintainability of writ petition under Article 32, this decision was later over-ruled by the Supreme Court in *Smt. Ujjam Bai Vs. State of Uttar Pradesh*, . In *J.K. Steel Ltd. Vs. Union of India (UOI)*, , Hegde, J, considered the question, how far subordinate legislation made in the statute could be taken into account for the purpose of interpreting the statute itself. His Lordship observed at page 502 in this connection as follows :-

"In the case of fiscal statute it may not be inappropriate to take into consideration the exemptions granted in interpreting the nature and the scope of the impost...the levy and exemption are parts of the same scheme of taxation. The two together carry into effect the purpose of the legislation. For finding out the true scheme of a taxing measure we have to take into consideration not merely the levy but also the exemptions granted."

On this observation, it is arguable that the goods manufactured by the petitioner cease to be "excisable goods" after they were exempted from payment of duty. For the exemption notification was entitled to be regarded as part of the Act itself. If the Act and the Notification are read together, the effect is the goods manufactured by the petitioner were taken out of the First Schedule and,

Therefore, were not "excisable goods" within the meaning of Section. 2(d) of the Act. If so, Rule 9 could not apply to them,

18. In the present case the utmost that the respondents can argue is that the Excise Officer could make a mistake in thinking that the petitioner was entitled to exemption. As the Assistant Collector had said in his order, this mistake was sought to be corrected latter be the demand. But such a demand has to be made within the period of limitation prescribed by Rule 10. As this was not done by the demand is not tenable under Rule 10. As Rule 10 applies to the facts of this case Rule 10A does not apply inasmuch as it is residuary rule which can apply when no other rule is applicable.

19. The writ petition is, Therefore, allowed and the demand notices Nos. 22961/61, dated 4th April, 1967 and 22943/61, dated 25th May, 1969, issued against the petitioner and the orders dated 29th July, 1969 by the Government of India, 25th November, 1968 by the Collector and 9th August, 1967 by the Assistant Collector are quashed. In the circumstances, I make no order as to costs.