

(2004) 06 CAL CK 0070
In the Calcutta High Court
Case No : F.M.A.T. No. 2604 of 1992

Superintendent of Central Excise and Others

APPELLANT

Vs

Texmaco Limited and Another

RESPONDENT

Date of Decision : 16-06-2004

Acts Referred:

Central Excise Rules, 1944 — Rule 56A, 57A, 8(1)

Citation : (2004) 4 CHN 167 : (2004) 176 ELT 93

Hon'ble Judges : Rajendra Nath Sinha, J; Dilip Kumar Seth, J

Bench : Division Bench

Advocate : Jayanata Banerjee and Subir Pal, for the Appellant; R.N. Bajoria, J.P. Khaitan and C.M. Ghorawat, for the Respondent

Judgement

Dilip Kumar Seth, J.—After hearing the learned counsel for the parties, it appears that the delay has been explained sufficiently. We, therefore, condone the delay. Let the appeal be registered.

On the question of condonation of delay both the learned counsel for the parties had addressed the Court on the merits of the appeal, By consent of the parties, the appeal is treated as on day's list for hearing. We have heard the matter on the merit as well.

Facts :

2. A show cause notice was issued to the respondent requiring levy of excise duty, as per classification under Heading 8607 of Central Excise Tariff Act, 1985, on the ground that the assessee was not entitled to obtain the benefit of two exemptions under Notification No. 217/86-CE dated 2nd November, 1986 which were mutually exclusive. This was challenged in a writ petition being C.O. No. 14170 (W) of 1991. The learned Single Judge by a decision dated 2nd December, 1991 was pleased to quash this notification on the ground that even assuming the allegations made in the show cause that there were two products, even then there was no justification of assuming that the assessee was availing the benefit

of two notifications in respect of one product. Inasmuch as, if these are assumed to be two products in that event it would be entitled to exemption in respect of inputs under Notification No. 452/86 and the end product is entitled to the benefit under Notification No. 217/86. The learned Judge had also found that the exemption under the said two notifications were granted in exercise of the power conferred under Rule 8(1) of the Central Excise Rules, 1944 whereas the case made out in the show cause notice was admitted to confuse the adjustment available under Rule 57A which is altogether distinct, separate and independent of each other. This decision of the learned Single Judge was reported in *Texmaco Ltd. Vs. Union of India (UOI)*,

Submission on behalf of the appellant:

3. This appeal has since been preferred by the Superintendent of Central Excise against the said judgment. Mr. Jayanta Banerjee, learned counsel for the appellant points out that the "Stabled Wagon" is different product which is manufactured in one of the units of the assessee capable of being marketed and treated as an end product subject to excise duty as an input which is captively used when mounted on the bogies for production of the complete wagon. These two independent products are chargeable to excise duty. The assessee is obtaining relief under the Notification No. 217/86 on the stabled wagon and then the benefit under notification No. 452/86 on the finished product. Thus the assessee was availing the benefit of two notifications by seeking adjustment, which is otherwise not available in view of the proviso to Notification No. 452/86 on the strength of Rule 57A. He contended that the assessee is entitled only to opt for one of the exemptions and not for both in respect of one product. He relied on the decision in 1997 (94) ELT 139 where the CEGAT North Bench, New Delhi had occasion to hold that the assessee could not avail of the benefit under Notification No. 217/86 and the Notification No. 53/88 and Notification No. 14/92. He also relied on the decision in 1996 (63) ECR 51 where the CEGAT, Old Special Bench "C", New Delhi had held that the benefit under Notification No. 53/88 and Notification No. 217/85 could not be availed together. He has also drawn our attention to various other materials to support his contentions.

Submission on behalf of the assessee/respondent:

4. On the other hand, Mr. R.N. Bajoria, learned Senior Counsel appearing for the respondents, points out that the entire submission of Mr. Banerjee is fallacious. In fact the appellant has sought to make out a case of eating the cake and having it too. If stabled wagon is one product and the finished one is another, in that event, the reliefs obtained under two Notification Nos. 217/86 and 452/86 were not utilized for one but for two products. Therefore, the question of exemption of inputs would not be material. Secondly, the question of payment of duty is the predominant ingredient for application of adjustment under Rule 57A. It does not deal with the case of exemption altogether. While these Notification Nos. 217/86 and 452/86 were issued under Rule 8(1) of the 1944 Rules. In case where such notifications were issued under two different rules it may be a

question of exercising option with regard to a particular notification under one or the other rule. But where the notification was issued under a particular rule, there is no question of such option unless it was specifically provided. He relied on the decision in *Hemraj Gordhandas v. H.H. Dave*, Assistant Collector of Central Excise and Customs, Surat and Ors. 1978 ELT (350) to contend that in a taxing statute, there is no assumption for any intendment but regard must be had to the clear meaning of the words. If the tax exemption is within the plain terms of the order/notification etc. the benefit thereof cannot be denied by calling in aid of any supposed intention of the exempting authority. No word can be added to the notification or statute. He relied on the decision in *Union of India v. Tata Iron Steel Co, Ltd., Jamshedpur* 1997 ELT (61) (NSC) to support his above contention that unless it is clear from the expression used, nothing can be inferred. If it was to be so understood in that event "only", "exclusively" or "entirely" would have been used to express the same; we cannot read into the provision any of these expressions while interpreting a statute.

4.1. Mr. Bajoria has drawn our attention to the various provisions of the two notifications as well as to Rule 8(1), Rule 57A and the notification issued under Rules 56A and 57A of the 1944 Rules and had made it clear that it is only in respect of the goods specified in the said two Notification Nos. 217/86 and 452/86, the question of exemption would be applied. It is immaterial whether these are two products or one product, even assuming that the stabled wagon being used as inputs captively for the end product. If these are two products independent of each other then stabled wagon would be exempted from excise duty under Notification No. 217/86 and then the end i.e. the other product wagon would be entitled to payment of excise duty at the reduced rate specified in Notification No. 452/86. There was no question of payment of duty on inputs when it is exempted and as such there is no scope for claiming any adjustment of duty paid from the duty payable for the end product. Therefore, on the face of the show cause notice, it appears that there was no substance on the contention sought to be raised and the process would unnecessarily put the petitioner to a sufferance of undergoing a proceedings, when there was no basis at all. Therefore, the show cause was rightly quashed.

The show cause notice :

5. We have heard the learned counsels for the respective parties at length. The dispute arose on the basis of the notification and the show cause notice issued since quoted in the judgment appealed against. Though it would be a repetition but in order to clearly appreciate and for avoiding turning pages for reference to the notification and the show cause notice, we would like to quote the show cause notice as hereafter:

"M/s. Texmaco Ltd., Sodepur Works, have manufactured fabricated Bodies of open and covered wagons out of steel materials supplied by Rly. Deptt. free of cost for mounting on the Railway bogies in the manufacture of Railway box wagons falling under sub-heading No. 8606.00. Such Railway box wagons are

cleared on payment of specific rate of duty vide Notification No. 452/86-C.E., dated 20.11.1986 which denies the input duty relief under Rule 57A. But they have not paid any Central Excise duty on such bodies of wagon (i.e. wagon components & parts) fabricated/manufactured and captively consumed:

(i) the bodies of wagon as fabricated were identifiable (wagon/ components & parts) as "stable wagon" to be mounted on bogies classifiable under sub-heading 8607.00 and as per Rules 9 & 49 duty was attracted on captive consumption;

(ii) the Notification No. 217/86-C.E., dated 2.11.1986 and Notification No. 452/86-C.E., dated 20.11.1986 in which concessional rate of duty on finished product is allowed by curtailing the benefit of availment of credit of duty on inputs, are obviously mutually exclusive. Because whereas Notification No. 452/86 denies the credit on inputs, the Notification No. 217/86 materially allows the same thus availing the benefit of both notifications simultaneously frustrates the very purpose of issuing such notifications resulting in loss of Govt. revenue to the tune of Rs. 65,18,719.70 during the period from August, 1990 to January, 1991.

The said assessees are hereby required to show cause to the Asstt. Collector of C.E., Khardah Division, 4, Brabourne Road, Calcutta, within 30 (thirty) days of receipt, this notice as to why:

(i) the said amount of Rs. 65,18,719.70 should not be recovered from the said assesses u/s 11A of Central Excise and Salt Act, 1944;

(ii) the bodies of wagon (i.e. wagon components & part) should not be classified under 8607.00 of Central Excise Tariff Act, 1985;

(iii) the benefit of exemption of Notification No. 217/86 dated 2.11.1986 should not be disallowed in respect of bodies of wagon internally used in the manufacture of Railway box wagon when the benefit of Notification No. 452/86, dated 20.11.1986 was availed of for payment of Central Excise duty on such Railway box wagons (final product);

(iv) a penalty should not be imposed on them for violation of C.E. Rules & notifications ibid as per Rule 173Q."

The Notifications :

6. In order to appreciate the said show cause, it is necessary to refer to the Notification Nos. 217/86 and 452/86 which we would like to quote as hereafter :

NOTIFICATION No. 217/86-CENTRAL EXCISE

In exercise of the powers conferred by Sub-rule (1) of Rule 8 of the Central Excise Rules, 1944, the Central Government hereby exempts goods specified in column (2) of the Table hereto annexed (hereinafter referred to as "inputs") manufactured in a factory and used within the factory of production, in or in relation to the manufacture of final products specified in column (3) of the said

Table, from the whole of the duty of excise leviable thereto, which is specified in the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986):

Provided that nothing contained in this notification shall apply to inputs used in or in relation to the manufacture of final products which are exempt from the whole of duty of excise leviable thereon or is chargeable to nil rate of duty.

Explanation.....

Description of inputs			Description of final products			Sl. No.
						1. 2. 3.
						1. Goods
classifiable under any Goods classifiable under any headings of Chapters 28, 29, 30, 32, headings of Chapters 28, 29, 30, 33, 34, 35, 36, 37, 38, 39, 40, 48, 70, 32, 33, 34, 35, 36, 37, 38. 39, 40, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 70, 72, 73, 74, 75, 76, 77, 78, 79, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 80, 81, 82, 83, 84, 85, 86, 87, 88, 92, 93, 94, 95, or 96 (other than those 89, 90, 91, 92, 93, 94, 95 or 96 falling under Heading No. 36.03 or (other than those falling under 37.05) of the Schedule to the Central Heading No. 36.03 or 37.05) of Excise Tariff Act, 1985 (5 of 1986). the Schedule to the Central Excise Tariff Act, 1985			(5 of 1986).			

NOTIFICATION No. 452/86-CENTRAL EXCISE

In exercise of the powers conferred by Sub-rule (1) of Rule 8 of the Central Excise Rules, 1944, the Central Government hereby makes the following amendments in the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 214/86-Central Excise, dated the 25th March, 1986, namely :

In the said notification, in the opening paragraph--

- (i) the existing Explanation shall be numbered as Explanation I; and
- (ii) after Explanation I as so numbered, the following Explanation shall be inserted, namely: -

Explanation II.....

Exemption to specified goods falling under Chapter 86. -- In exercise of the powers conferred by Sub-rule (1) of Rule 8 of the Central Excise Rules, 1944, the Central Government hereby exempts the goods of the description specified in column (3) of the Table hereto annexed and falling under sub-heading No. of the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as is specified in the corresponding entry in column (2) of the said Table from so much of the duty of excise leviable thereon which is specified in the said Schedule, as is in excess of the amount calculated at the rate specified in the corresponding entry in column (4) of the said Table :

Provided that no credit of duty on any of the inputs used in the manufacture of the said goods has been availed of under Rule 56A or Rule 57A of the said rules :

Provided further that where single sub-units of three-car DCEMU coaches, mentioned in Sl. No. 1 of the Table, are cleared as spares forming part of a contract for the supply of the complete units of three-car DCEMU coaches, duty for each such sub-unit shall be leviable at the rate of one-third of the duty payable on the complete units.

-----								Sl.		
Sub-	Description	of	goods	Rate	of	duty	No.	heading	No	
-----								1	2	3
4	-----									01
8604.00	Each complete unit of three-car-DCEMU-coaches, Rs. 3,62,000 per consisting of three sub-units namely, a motor complete unit coach, a driving-trailer-coach and a non- driving-trailer coach.									
02	8605.00	Each unit of broad guage second-class coaches Rs. 1,12,000 per including postal vans and luggage-cum-brake unit. vans.								
03	8605.00	Each unit of metre guage second class coaches Rs. 65,000 per including postal vans and luggage cum-brake unit vans.								
04	8606.00	Each unit of bogie-open-eight-wheeler wagons Rs. 23,000 per of pay-load not exceeding 60 tonnes. unit								
05	8606.00	Each unit of eight-wheeler covered wagons of Rs. 33,500 per pay-load not exceeding 60 tonnes. unit								
06	8606.00	Each unit of four-wheeler tank wagons of pay- Rs. 19,000 per load not exceeding 23 tonnes. unit								
07	8606.00	Each unit of eight-wheeler tank-wagons of Rs. 38,000 per pay-load not exceeding 60 tonnes. unit								

(Notification No. 452/86-C.E., dated 20.11.1986 as amended by Notification No. 118/87-C.E., dated 14.4.87)"

Admitted facts :

7. Before we discuss the Notifications and the show cause notice we may look into the facts, which are not in dispute. The assessee manufactures wagons etc. on behalf of the Railways. The box wagon, which is known as stabled wagon is mounted on wheeled bogies. Both are manufactured by the assessee on the basis of the materials particularly steels and other inputs supplied by the Railways. There are occasions when the supply of the materials were delayed. In such case the box wagon cannot be mounted on the bogies and are termed as stabled wagons. During such delay, some advance payments are also obtained by the assessee. The box wagons/stabled wagons were not marketable

commodity unless it was used as raw materials by someone else. It has no utility in the market until mounted on the wheeled bogies. These stabled wagons are captively used by the assessee for manufacturing the end products. Now even if these stabled wagons were taken to be an end product even then it was being captively used as inputs by the assessee. The end product that was transferred from the factory of the assessee was the wagon not the stabled wagon.

The exemption :

8. Rule 8(1) empowers the Central Government to exempt wholly or in part from payment of excise duty in relation to the inputs described in column (2) of the said Notification if used for the end/final products described in column (3). Our attention was drawn to these two columns and it was pointed out that in case exclusively any of the goods, which includes 8606, being inputs, if used in the end/final products being the goods exclusively under any of the heading which includes 8606 then such inputs captively utilized for the production of the end products are exempted from payment of duties. However, the proviso provides that it would not apply to goods where the end product is fully exempted from excise duty or chargeable to nil rate of duty. Admittedly, in this case the end products are neither chargeable to nil rate of duty nor wholly exempted from excise duty leviable thereon. Therefore, if we treat the stabled wagon as an independent marketable goods chargeable to excise duty then it would attract the benefit of this Notification No. 217/86, since the end product is neither chargeable to nil rate of excise duty nor wholly exempted from excise duty.

Chargeability :

9. However, the chargeability of the excise duty of this end product is again subject to Notification No. 452/86 which provides for exemption of duty in excess of the amount calculated at the rate specified in the corresponding entry in column (4) of the Table of the said notification. However, the first proviso declined the benefit of this notification if the benefit of Rule 56A or Rule 57A was availed of in respect of any of the inputs in the process of manufacture. The Table in column (2) included items 8604, 8605 and 8606. It did not include item 8607. The end product was charged under item 8606 and admittedly the assessee had paid the duty leviable under Table on the head 8606 at the rate mentioned in column (4) in respect of each unit-open-bogie-eight-wheeler-wagons. Thus, this was neither exempted wholly from duty nor charged nil rate of duty. Neither any duty was paid on the inputs being stabled wagon nor any benefit of Rule 56A or Rule 57A was obtained in respect thereof. Then Rule 56A does not provide for any relief in respect of item 8606. At the same time, Rule 57A though includes head 8606 yet there being no payment of duty of any of the inputs and the assessee having not claimed any adjustment therefore there was no scope for the application of Rule 57A. In other words, in this case Rule 57A cannot be attracted. If by reason of Notification No. 217/86, even assuming that the stabled wagon was an independent product and chargeable as input, which question we need not go into, even then no duty being leviable under the said

notification issued under Rule 8(1) being altogether independent, separate, distinct and different from the concept of adjustment contemplated under Rule 57A and therefore no payment being made, the question of adjustment was wholly preposterous.

Conclusion:

10. Thus, on the face of the impugned show cause notice it appears that it did not disclose even prima facie that there was any substance on the question sought to be raised and that by any stretch of imagination the principle of Rule 57A could at all be attracted in the present facts and circumstances of the case when the scope of Rule 8(1) is completely distinct, different and independent of the field or area where Rule 57A operates. There was no scope of inviting the principle of enjoying double benefits. Inasmuch as, if it was one end product, it is entitled to the benefit of the Notification No. 452/86. If it is two products in that event the stabled wagon was liable for exemption under Notification No. 217/86 and the end product was liable to be charged at the rate specified in Notification No. 452/86.

10.1. This question has since been far more elaborately dealt with and rationally decided by the learned Single Judge. We have been benefited by the erudite reasons given by the learned Single Judge in the judgment itself from which we derive the inspiration to agree with the submission since well-explained by Mr. Bajoria.

Jurisdiction :

11. The question of jurisdiction to entertain this writ petition was also decided against the appellant. In his usual fairness Mr. Banerjee did not address the Court on the question of jurisdiction. Even then we find that the learned Single Judge was right in holding that in such a case where on the face of the show cause notice, there was no substance in it and it would entail unnecessary sufferance of a proceedings by a citizen who has every right to carry on his business peacefully, the Court cannot sit idle and can interfere particularly when no facts are required to be decided and the matter is capable of being adjudicated purely on the question of law.

Order:

12. In the result the appeal fails and the judgment and order appealed against is hereby affirmed. There will, however, be no order as to costs.

13. Urgent xerox certified copy of this order, if applied for be given to the parties on priorities basis.

Rajendra Nath Sinha, J.

14. I agree.