

(1989) 12 RAJ CK 0025

In the Rajasthan High Court

Case No : Civil Writ Petition No"s. 1744 to 1745 and 1753/89

Swastik Metals

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 06-12-1989

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35A

Citation : (1990) 49 ELT 45

Hon'ble Judges : A.K. Mathur, J

Bench : Single Bench

Advocate : B.C. Mehta, for the Appellant; N.M. Mathur, for the Respondent

Final Decision : Allowed

Judgement

A.K. Mathur, J.—In all these three writ petitions, common questions of law and facts are involved. Therefore, they are disposed of by this common.

2. For the convenient disposal of all these writ petitions, the facts of S.B. Civil Writ Petition No. 1753/1989 : M/s. Mehta Metals Industries are taken into consideration.

3. The brief facts giving rise to this writ petition are that the petitioner M/s. Mehta Metal Industries is a partnership firm duly registered under the provisions of the Indian Partnership Act, 1932. The petitioner is a re-roller of stainless steel product namely known as "Patta". The product is roughly shaped. It is even in shape, size and thickness. The petitioner installed small equipment which are capable of rolling only small piece of raw materials from 2 to 10 kg. in weight. The Rolling equipment or machinery installed by the petitioner are not strip mills and there is no provision of facilities for coiling and de-coiling the rolled product. The product manufactured by the petitioner was incorrectly classified by the respondent No. 4 as sheet or strips falling under sub-item (ii) of Tariff Item No. 26-AA of the erstwhile Central Excise Tariff in spite of the factum that the petitioner requested the respondents to classify the product as Patta/Patti under

sub-item No. (ia) of the erstwhile Tariff Item No. 26-AA. The petitioner has been paying excise duty under protest. Thereafter, the petitioner came to know about the proper classification of the said product and the petitioner claimed the correct classification as hot and cold rolled product. The Assistant Collector, Central Excise, Jodhpur did not accede to the request of the petitioner and rejected the claim of the petitioner for change of the classification in spite of the Appellate Tribunal's decisions dated 1-6-1984 in the case of M/s. C.D. Industries and dated 29-5-1985 in the case of M/s. Ae Vee Iron & Steel Works Pvt. Ltd., Bombay when the same issue was considered by Shri P.C. Jain, Collector (Appeals) by his order in Appeal No. 60 to 67/Jod/85 dated 16-2-1985 while disposing of 8 appeals, which also emanated from Jodhpur.

3A. Aggrieved against the order of the Assistant Collector, Central Excise, Jodhpur by not having correctly classifying the said product of the petitioner as Patti/Patta under sub-item No. 4(ia) of Tariff Item No. 26-AA the petitioner and other 15 persons filed appeals before the Collector (Appeals), Central Excise, New Delhi u/s 35A of the Central Excises & Salt Act, 1944 (hereinafter to be referred to as "the Act of 1944"). The Collector (Appeals), Central Excise & Customs, New Delhi disposed of 14 appeals by common order dated 22-1-1986 and two appeals by common order dated 11-2-1986 filed by the petitioner and 15 other persons. The appeals were allowed with certain directions by the order dated 22-1-1986 and 11-2-1986, which have been placed on the record as Ex. 1. By virtue of the appellate orders the petitioner claimed refund of the excise duty paid under protest or paid by mistake of law. The petitioner submitted an application on 27-1-1986 for refund of Rs. 1,06,810/- along with interest at the rate of 24% per annum. The application for refund dated 27-1-1986 has been produced on the record as Ex. 2. The applications of some of the applicants for refund was accepted in pursuance of the order dated 22-1-1986 and 11-2-1986 passed by the Collector (Appeals), Central Excise, New Delhi by the Assistant Collector, Central Excise, Jodhpur. The claims of the following 8 persons were accepted :-

1. M/s. Surana Metals, Jodhpur.
2. M/s. Shri Ram Metals, Jodhpur.
3. M/s. Avon Udyog, Jodhpur.
4. M/s. Alpha Alloy Steel, Jodhpur.
5. M/s. Manish Industries, Jodhpur.
6. M/s. Kothari Metal Industries, Jodhpur.
7. M/s. Sonal Metals Private Limited, Jodhpur.
8. M/s. Allied Metals, Jodhpur.

4. But the claims of other persons like the petitioner and two other persons were not accepted along with some more persons. The copy of the order dated

20-10-1986 passed by the respondent No. 4 has been placed on record as Ex. 3.

5. Aggrieved against this order passed by the respondent No. 4, the petitioner and other preferred appeals before the Collector (Appeals), Central Excise, New Delhi. The Collector (Appeals), Central Excise accepted the appeals by the order dated 9-6-1987 and observed that the Assistant Collector's findings about the strip mills was not based on the opinion of the experts in the field and technical literature. It was observed that it was rather contrary to them and cannot be sustained. The learned Collector (Appeals), New Delhi remanded the case back to the Assistant Collector, Central Excise, Jodhpur for de novo consideration in the light of the observations made by him. A copy of this order has been placed on the record as Ex. 4. The Assistant Collector respondent No. 4 gave the de novo consideration to the contentions raised by the petitioner in the light of the directions given by the Collector (Appeals) vide his order dated 9-6-1987 and again rejected the claims of the petitioner and other persons by his order dated 18-9-1987. A copy whereof has been placed on the record as Ex. 5.

6. Aggrieved against this order, the petitioner filed an appeal before the Collector (Appeals), Central Excise, New Delhi and the Collector (Appeals) accepted the appeal filed by the petitioner by his order dated 20-9-1988 and set aside the order passed by the Assistant Collector, Central Excise, Jodhpur dated 18-9-1987 and directed that consequential relief may be granted to the petitioner. A copy of the order dated 20-9-1988 has been produced on the record as Ex. 6.

7. Aggrieved against the appellate order dated 20-9-1988 passed by the Collector (Appeals) Central Excise, New Delhi, the Assistant Collector, Central Excise, Jodhpur preferred an appeal before the Customs, Excise & Gold Control Appellate Tribunal, New Delhi (referred to hereinafter as "the Tribunal") alongwith a stay application praying stay of the order under appeal dated 20-9-1988 passed by the Collector (Appeals), Central Excise, New Delhi. The Tribunal, however, rejected the stay petition by its order dated 25-1-1989. A copy of the same has been produced on the record as Ex. 7. Thereafter, the appeal filed by the Assistant Collector, Central Excise, Jodhpur came up for final consideration and the Tribunal by its order dated 31-8-1989 dismissed the appeal filed by the Assistant Collector, Central Excise & Customs and the same has been placed on record by filing a separate application. There was a typographical error in the order dated 31-8-1989, that instead of writing that the appeal is dismissed, Tribunal mentioned that we accordingly allow the appeals. Thereafter, an application was filed for rectification of this typographical error and the same was rectified by the Tribunal by its order dated 25-10-1989. A copy of that order has also been placed on record along with an affidavit in support thereof.

8. The resultant position is that the order passed by the Collector (Appeals) Central Excise, New Delhi dated 20-9-1988 was affirmed and the contention of the petitioner was upheld. In these circumstances, the petitioner has filed the present writ petition seeking a direction to the respondents that the excise duty charged from the petitioner in excess may be refunded back to him with interest.

Mr. N.N. Mathur, learned counsel appeared on behalf of the respondents and opposed the writ petition.

9. I have heard both the learned counsels and have also perused the record.

10. The short question which requires consideration in this case is that after the contention of the petitioner being upheld on a chequered history of litigation, the petitioner is entitled to refund with interest or not. From the facts mentioned above, it is apparent that a number of litigations ensued for classification of the product of the petitioner and ultimately the contention of the petitioner was upheld that the petitioner's product has not been properly classified and the respondents have wrongly charged the excise duty from the petitioner. Since this contention has been upheld by the Collector (Appeals) Central Excise, New Delhi as well as by the Tribunal that the petitioner's product has not been properly classified and as per the correct classification the amount of excise duty paid by the petitioner under protest should have been refunded back to him. The Tribunal observed as under in this context :-

"The Supreme Court confirmed the above view of the Tribunal when there is an uncertainty to determine the nature of the product on the basis of dimensions, classification should be on the basis of the mill in which it is manufactured. The judgment of the Supreme Court should be understood in the context of the order of the Tribunal and in its totality."

11. It was further observed by the Tribunal as under :-

"The order of the Tribunal as confirmed by the Supreme Court is all the more relevant to the facts of the present case as there is no definition of "strip" under the Central Excise Act prior to 1-3-1988. In the absence of definition under the Central Excise Tariff, the only method of classification should be on the basis of mill in which it is manufactured as per the order of this Tribunal and also as per the text book on which it is relied upon."

12. In this view of the matter, the product of the petitioner was classified under Tariff Item No. 26-AA (1a) and therefore, the petitioner is entitled to refund. The petitioner has claimed refund along with 24% interest and in support of the aforesaid contention the learned counsel has invited my attention to Redihot Electricals v. Union of India and Ors. - (1989) 30 STL 103 (Del.) D. Cawasji and Co., Mysore Vs. State of Mysore and Another, and Commissioner of Sales Tax v. Auriaya Chambers of Commerce - (1986) 18 STL 1 (SC).

13. In Commissioner of Sales Tax v. Auriaya Chambers of Commerce, it was observed as under :-

"Where indubitably there is in the dealer legal title to get money refunded and where the dealer is not guilty of any laches and where there is no specific prohibition against refund, one should not get entangled in the cobweb of procedures but do substantial justice. Therefore when the assessee or dealer made an application for revision the Additional Judge (Revision) could direct a

refund because money was being illegally retained by the revenue. If mistake either of law or of fact is established, the assessee is entitled to recover the money and the party receiving them is bound to return it irrespective of any other consideration."

14. Therefore, in these circumstances, so far as the charging of the excise duty under a wrong classification is concerned, the same was a bona fide mistake on the part of the revenue, though the petitioner protested it right from the beginning. But ultimately the petitioner succeeded in establishing the same right upto the Tribunal that the revenue has not correctly classified its item and has wrongly charged the excise duty. In this view of the matter, the respondents are bound to refund the amount of excise duty collected by them.

15. Now, the next question which arises for my consideration is whether the petitioner is entitled to interest from what date and at what rate. In the present case as per the allegations of the petitioners they protested right from the beginning that they are not liable to pay duty under sub-item (ii) of Tariff Item No. 26-AA erstwhile but under sub-item No. (1a) of the erstwhile Tariff Item No. 26-AA. This has not been controverted by the respondent by filing a reply to the writ petition. Therefore, there is no reason to disbelieve the affidavit of the petitioner. Since the petitioner has protested the charging of excise duty under sub-item No. (ii) of Tariff Item No. 26-AA but his request was not acceded and the respondents continued to charge duty under this item and the petitioners continued to pay duty under protest. But the contention of the petitioner has ultimately succeeded at the highest Tribunal under the Act. Therefore, the petitioner is entitled to interest from the date of payment of the duty @ 12% per annum. In *Redihot Electricals v. Union of India and Ors.* the interest was allowed from the date of actual collection of duty at the rate of 12% per annum.

16. In the result, I allow this writ petition and S.B. Civil Writ Petition 1744/89 and 1745/1989 for the reasons mentioned above and direct the respondents to refund the amount of the excise duty charged with 12% per annum interest from the date of actual payment to the date of refund. The respondents are directed to make payment of the amount with interest as aforesaid within a period of 4 months from today.