

(1991) 12 CAL CK 0007
In the Calcutta High Court
Case No : Civil Order No. 14170 (W) of 1991

Texmaco Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 02-12-1991

Acts Referred:

Central Excise Rules, 1944 — Rule 173Q, 49, 56A, 57A, 8
Central Excises and Salt Act, 1944 — Section 11A

Citation : (1992) 59 ELT 522

Hon'ble Judges : Suhas Chandra Sen, J

Bench : Single Bench

Advocate : R.N. Bajoria, S.K. Bagaria and C.M. Ghorawat, for the Appellant; N.C. Roychowdhury and Prantosh Mukherjee, for the Respondent

Final Decision : Allowed

Judgement

Suhas Chandra Sen, J.—The petitioner, Texmaco Limited (in short the company), carries on the business, inter alia, of manufacturing and selling Railway Wagons, pursuant to and in terms of contracts entered into from time to time with the Ministry of Railways, Government of India, the Railway Board supplies to the Company various items free of cost, such as, Wheel Sets, Centre Buffer Couplers, Air Brake Equipment etc. (hereinafter referred as Free Supply Items). The wagons are manufactured by the Company by using the Free Supply Items as well as other raw materials/parts obtained or manufactured by it.

2. Central Excise duty on the manufacture of wagons is leviable under sub-heading No. 8606.00 of the Schedule to the Central Excise Tariff Act, 1985, the material provisions of which are as under:

Heading	Sub-heading	Description of goods.	Rate of duty
86.01	8601.00	Rail locomotives, powered from an external source by electric accumulators	15%
86.02	8602.00	Other rail locomotives; locomotive tenders	15%
86.03	8603.00	Self-propelled railway or tramway coaches, vans and trucks, other than those of Heading No. 86.04	15%
86.04	8604.00	Railway	

or tramway maintenance of service 15% vehicles, whether or not self-propelled (for example, workshops, cranes, ballast tampers, tractliners, testing coaches and track inspection vehicles) 86.05 8605.00 Railway or tramway passenger coaches not 15% self-propelled; luggage vans, post office coaches and other special purpose railway or tramway coaches not self-propelled (excluding those of Heading No. 86.04) 86.06 8606.00 Railway or tramway goods vans and wagons, not 15% self-propelled 86.07 8607.00 Parts of railway or tramway locomotive or rolling 15% stock 86.08 8608.00 Railway or tramway track fixtures and fittings; 15% mechanical (including electro mechanical) signalling, safety or traffic control equipment for railways, tramways, roads, inland waterways, parking facilities, port installations or airfields; parts of the foregoing. 86.09 8609.00 Containers (including containers for the transport 15% of fluids) specially designed and equipped for carriage by one or more modes of transport.

3. By a notification, bearing No. 452/86-C.E., dated November 20, 1986 as amended, the Central Government has exempted the wagons of the description mentioned in Table annexed to the said Notification from so much of the duty of excise leviable thereon as is in excess of the rates specified in the said Table. The said exemption is available provided no credit of duty on any of the inputs used in the manufacture of the said wagons has been availed under Rule 56A or 57A of the Central Excise Rules, 1944.

4. The arguments on behalf of the petitioners as well as the respondents have centred around the two notifications issued by the Government of India, both dated 2nd April, 1986. The Notifications are No. 217/86-Central Excises and No. 452/86-Central Excises. The second notification has been amended from time to time on 20th November, 1986 and again on 15th April, 1987. There has been further amendments to this notification but those amendments are not material for the purpose of this case.

5. The material part of the two notifications are as under :

NOTIFICATION No. 217/86-CENTRAL EXCISES

1. 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....

S. Description of inputs Description of final products No. 1. 2 3 1. Goods classifiable under any Goods classifiable under any headings headings of Chapters 28, 29, 30, of Chapters 28, 29, 30, 32, 33,34, 35, 36, 37, 38, 32, 33, 34, 35, 36, 37, 38, 39, 39, 40, 70, 72, 73, 74, 75, 76, 78, 79, 80, 81, 82, 40, 48,70, 72, 73, 74, 75, 76, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 78, 79, 80, 81, 82, 83, 84, 85, or 96 (other than those falling under Headings Nos. 36.03 86, 87, 88, 89, 90, 91, 92, 93, or 37.05) of the Schedule to 94, 95, or 96 (other than those the Central Excise falling under Headings Nos. 36.03 Tariff Act, 1985 (5 of 1986). or 37.05) of the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) NOTIFICATION No. 452/86-CENTRAL EXCISES

2. 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:

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 57A of the said rules:

Provided further that where single sub-units of three-car DCEMU coaches, mentioned in S1. 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-heading Description of goods Rate of duty No. 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, complete unit. a motor coach, a driving-trailer-coach and a non-driving-trailer coach. 02. 8605.00 Each unit of broad guage second class Rs. 1,12,000 per unit. coaches including postal vans and luggage-cum-

brake-vans. 03. 8605.00 Each unit of metre guage second class Rs. 65,000 per unit. coaches including postal vans and luggage-cum-brake vans. 04. 8606.00 Each unit of bogie-open-eight-wheeler Rs. 23,000 per unit. wagons of pay-load not exceeding 60 tonnes. 05. 8606.00 Each unit of eight-wheeler covered wagons of Rs. 33,500 per unit. pay-load not exceeding 60 tonnes. 06. 8606.00 Each unit of four-wheeler tank-wagons of Rs. 19,000. per unit. pay-load not exceeding 23 tonnes. 07. 8606.00 Each unit of eight-wheeler tank-wagons of Rs. 38,000 per unit. pay-load not exceeding 60 tonnes.

(Notification No. 452/86-C.E., dated 20-11-1986 as amended by Notification No. 118/87-C.E., dated 15-4-1987).

6. The case of the petitioner is that the Company is availing of the exemption under the said Notification No. 452/86-C.E. in respect of the wagons cleared from its factory. Such wagons are cleared on payment of duty at the reduced rates mentioned in the Table annexed to the said Notification. The Company does not take any credit of the duty paid on any of the inputs used in the manufacture of the said wagons under Rule 56A or 57A of the 1944 Rules.

7. Sometimes the Railway Board fails to supply the required Free Supply Items in time. In such cases, the Company obtains payments from the Railway Board to overcome financial constraints against the incomplete wagons. For the sake of convenience such incomplete wagons are called Stabled Wagons". Such instances of stalling and/or holding up of further manufacturing process are however rare and occur only in exceptional cases when the Railway Board is not in a position to supply the required Free Supply Items as per Schedule. As soon as the remaining Free Supply Items are supplied by the Railway Board, the incomplete wagons (called Stabled Wagons) are completed and are than cleared on payment of appropriate central excise duty at the reduced rate in terms of the said Notification No. 452/86-C.E.

8. On February 25,1991, the respondent No. 1 issued a Notice to show cause alleging, inter alia, that the said incomplete wagons called "Stabled Wagons" are independent and different marketable commodities and that the same are classifiable as parts of railway wagons under sub-heading No. 8607.00 of the Schedule to the 1985 Act. The said notice was issued on the assumption that the said incomplete wagons are independent and different marketable commodities and that the same invariably are manufactured before manufacture of a wagon.

9. The Company submitted its reply to the said notice by its letter dated April 24, 1991. In the said reply, the Company submitted, inter alia, that the said so-called "Stabled Wagons" were nothing but incomplete wagons awaiting completion of manufacture with the remaining Free Supply Items and there could be no question of the same being treated or regarded as parts of railway wagons. It was further submitted that in any event and even assuming though denying that the said incomplete wagons could be treated as parts of wagons as alleged in the said notice, even then no duty could be levied thereon in view of the total

exemption granted by the Notification No. 217/86-C.E., dated April 2, 1986 issued under Rule 8(1) of the 1944 Rules. The Assistant Collector of Central Excise, Khardah, the respondent No. 2, did not withdraw the said notice. Texmaco Limited, the petitioner, moved this writ petition, alleging that the notice and/or the proceeding vitiated by the notice were wholly without jurisdiction and should be quashed.

10. The first question that arises on this writ petition is whether the court should intervene in this matter at all. The Court does not interfere with a show cause notice except in a case where the show cause notice could not be justified in law even if the facts were taken to be correctly stated in the notice. If a show cause notice is issued by a statutory authority relying upon some facts that notice can only be challenged before the Writ Court on undisputed facts.

11. This show cause notice is not a jurisdictional notice. The Assistant Collector of Customs has not acquired jurisdiction to proceed by issuance of this show cause notice. The notice is issued for the purpose of clarification and also for the purpose of compliance with the principle of natural justice. Some prima facie case must be made out by the Assistant Collector of Customs which merits investigation. There is no disputed question of fact involved in this case. The petitioner's contention is that even if all the allegations in the show cause notice are assumed to be true even then the respondents have not made out any prima facie case against the petitioner's company.

12. It is not necessary to go into any disputed question of fact to decide this writ petition. The petitioner is right in its contention that even if the allegations of fact made in the show cause notice are assumed to be true and correct even then the respondents have failed to make out any prima facie case against the petitioner and the show cause notice and the proceedings pursuant thereto must be struck down on the ground that the entire approach of the respondents is vitiated in law and without any legal basis.

13. The allegations made in the show cause notice, in substance are as follows :-

"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 u/r. 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 2-4-1986 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. 65,18,710.70 should not be recovered from the said assessee u/s 11A of C.E. & Salt Act, 1944;

(ii) the bodies of wagon (i.e. wagon components & parts) should not be classified under 8607.00 of C.E.T. Act, 1985;

(iii) the benefit of exemption Notification No. 217/86 dated 2-4-1986 should not be disallowed in respect of Bodies of Wagon internally used in the manufacture of Rly. 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 Rly. 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."

14. It is difficult to follow why the Asstt. Collector has invoked the provisions of Rule 57(A) in the show cause notice. According to the show cause notice that the exemption granted under the said Notification No. 217/86-C.E. is not available to the petitioner for the reason that the company is availing the benefit of fixed rate of duty under the said Notification No. 452/86-C.E. Both the Notification Nos. 217/86-C.E. and 452/86-C.E. are issued under Rule 8(1) of the 1944 Rules, Notification No. 217/86-C.E. applies, inter alia, to all goods falling under Chapter 86 including parts and components under sub-heading No. 8607.00 whereas Notification No. 452/86-C.E. applies only to finished wagons and coaches falling under sub-heading Nos. 8604.00, 8605.00 and 8606.00.

15. All the conditions laid down for getting the benefit of the Notification No. 217/86-C.E. were fulfilled by the Company. The Company manufactures completed wagons, and pays duty on these products. Chapter 86 of Excise Tariff Act deals not only with completed wagons but also wagons which have not been completed and can be described as uncompleted wagons or stabled wagons. Both fall under Chapter 86 and are inputs and final products respectively specified in columns 2 & 3 of the Table to the said notification. The said inputs are used in the factory of production itself in the manufacture of the said final products, namely, the said completed wagons. The final products are not exempt from the whole of the duty nor are chargeable to "nil" rate of duty.

16. The first proviso to Notification No. 452/86-C.E. requires that for availing the benefit thereunder no credit of duty on any of the inputs used in the manufacture of the goods namely coaches or wagons should be availed of under Rule 56A or 57A of the 1944 Rules. According to the respondents the availing of benefit of exemption under Notification No. 217/86-C.E. would come within the scope of the said proviso and hence the company is liable to pay duty.

17. The entire approach of the respondents in this case is erroneous in law and is based on wrong assumption of law.

18. Assuming for the sake of argument that the said incomplete wagons can fall under sub-heading No. 8607.00 and further assuming that the said incomplete wagons are separate independent commodities capable of being marketed and there is manufacture, still no duty can be levied on the stabled wagons in view of the said Notifications.

19. The first proviso to Notification No. 452/86-C.E. refers to credit of duty availed under Rule 56A or 57A. Notification No. 217/86-C.E. is issued under Rule 8(1) granting exemption from levy of duty. It is not issued under Rule 56A or 57A for allowing availing of the credit. It may be mentioned that separate notifications have been issued under Rule 56A or 57A specifying the goods with reference to which the said benefit for availing credit of duty paid can be availed. In the instant case the company is not availing of any credit under any notification issued under Rule 56A or 57A and accordingly there is no question of the first proviso to Notification No. 452/86-C.E. coming in its way. The effect of the first proviso is that the reduced rate of duty under the said notification has to be actually paid and cannot be partly or wholly paid out of any credit availed under Rules 56A and 57A.

20. The concept of granting an exemption from duty and availing of the credit of duty paid on inputs are altogether different. In case of exemption there is no payment of duty whereas in the case of availing of credit there is payment of such duty and thereafter availing of the credit for such duty paid. Rule 8 on the one hand and Rules 56A and 57A on the other hand contain altogether separate, distinct and independent provisions providing for different reliefs in different set of circumstances. A perusal of the said Rules would show that separate notifications have to be issued for exercising the powers thereunder to confer reliefs referred to therein. Rule 8 authorises the Central Government to grant exemption from whole or part of the duty leviable whereas Rules 56A and 57A do not confer any such power. Rules 56A and 57A on the other hand envisage a procedure to be followed whereby the cascading effect of levy of duty at different stages from raw material to finished products is avoided. Such effect is avoided by giving credit for the duty already paid at the earlier stages on the inputs against the duty payable on the final manufactured product. The credit for the duty paid at earlier stages cannot be granted by way of refund. Such duty paid at the earlier stages either on the raw materials or on components can only be adjusted only if such components or raw materials are used in the further

manufacturing process. Such credit has to be utilised only for payment of the duty on the finished goods which would be made from such raw materials or components. The very fact of allowing the credit postulates a discharge of the liability of duty at the earlier stage.

21. The entire confusion appears to have been caused by reason of the marginal note given to the Notification No. 217/86-C.E. by a popularly used publication wherein it is mentioned "Exemption to Modvat items". This marginal note does not form any part of the notification itself. Secondly, it is well settled that the marginal note can never control the operative part of a section or the provisions of a notification. Thirdly, the marginal note merely gives description of the goods for which exemption under Rule 8(1) has been granted by the said Notification No. 217/86-C.E. and giving of such description does not make it a notification under Rule 56A or 57A for availing the credit of duty paid on Modvat items.

22. Mr. Roy Chowdhury, appearing on behalf of the Customs Deptt. made a desperate argument that the petitioner cannot claim benefit of the aforesaid two notifications because of the fact that the Government of India had supplied certain parts free of cost to the petitioner. This case has not been made out in the show cause notice. Moreover, I fail to see any legal basis for this argument. The notifications do not say that the manufacturer will not be able to avail of the benefit of the notifications, if it has received any part free of cost. Mr. Roy Chowdhury wanted to explain what he understood to be the underlying assumption behind the notifications.

23. In my view the notifications must be read without any assumption and without distorting the language of the notifications. In the case of Commissioners of Inland Revenue and Another v. Rossminster Ltd. and Others, 52 Tax Cases 160, it was observed by Lord Salmon that "However much the courts may deprecate an Act they must apply it. It is not possible by torturing its language or by any other means to construe it so to give a meaning which Parliament clearly did not intend it to bear".

24. This principle should also apply to the notifications issued by the Government. There is no need or justification for torturing the language of notifications and extract a meaning which it does not naturally bear on the basis of assumed intention of the Government.

25. In view of the aforesaid it is not necessary to go into the question whether the stabled wagons manufactured by the petitioner can be considered to be independent goods with a market of its own. There are also certain disputed questions of facts on which no opinion need be expressed.

26. This writ petition must succeed.

There will be an order in terms of prayers (a), (b) and (c) of the writ petition.

There will be no order as to costs.