(1988) 07 CAL CK 0017

In the Calcutta High Court

Case No : Civil Order No. 17047 (W) of 1985

The Statesman Ltd. APPELLANT

Vs

The Assistant Collector, Central Excise and Others RESPONDENT

Date of Decision : 09-07-1988

Acts Referred:
Constitution of India, 1950 — Article 226

Citation : 92 CWN 969

Hon'ble Judges : Sudhir Ranjan Roy, J

Bench : Single Bench

Advocate : Bhaskar Gupta, Samir Chakraborty, Dilip Kumar Pal and A.K. Joardar, for the Appellant; Biswaranjan Ghosal and D.K. Mukherjee, for the Respondent

Final Decision : Allowed

Judgement

Sudhir Ranjan Roy, J.—This is a strange and peculiar case where the Central Excise authorities have proceeded to realise excise duty not from the manufacturer or producer but from a consumer out and out, and that too on the basis of an exemption notification. The facts:

The petitioner, The Statesman Limited, is a Company incorporated under the provisions of the Indian Companies Act, 1913, and has its registered Office at Statesman House, No. 4 Chowringhree Square, Calcutta. The business of the Company is the publication and sale of newspapers including The Statesman which is published daily both in Calcutta and New Delhi.

2. The subject matter of the challenge in the instant writ petition is a purported show cause demand notice dated October 3, 1983 issued by the Assistant Collector of Central Excise, Calcutta-1 Division By the said show cause notice (in short, the impugned notice) the Company has been required to show cause why Central Excise duty to the tune of Rs. 19,29,538.23 for the period from May 1980 to May 1985 should not be demanded and paid by the Company under Rule 9(2) of the Central Excise Rules (in short, the Rules) framed, under the Central Excise

& Salt Act, 1944 and section 11A thereof. The allegations oh the basis of which the said impugned notice has been issued are as follows:-

On scrutiny of the records of the said assessee, it is noticed that the said assessee are receiving newsprint falling under Item No. 17 of the C.S.T. from different factories and enjoying exemption under Notification No. 163.67 dated 21.7.67. The waste arising out of opening waste of the newsprint and reel ends of the newsprint are being sold by them in the market as waste. In terms of said Notification the waste arising in the process of printing of newspaper may be used for any other purpose without payment of duty if the proper officer is satisfied that waste is genuine and cannot be used again. From the very name it indicates that the wastes as aforementioned are not arising in the process of printing. Therefore, the said assessee are not entitled to get the benefit of exemption as stipulated in the above mentioned Notification. Further the said assessee suppressed such selling of the above waste and also did not submit any declaration to the department in this regard. From their records the evasion of Central Excise duty to the tune of Rs. 19,29,583.23 has been calculated.

3. According to the petitioner, the said impugned notice has been issued in abuse of power and without application of mind and also for extraneous reasons, since on the allegations made in the said notices, no case for payment of any excise duty has been made out. As a matter of fact, the impugned notice has been issued without jurisdiction and is ultra-vires the Central Excise and Salt Act and the Rules framed thereunder.

4. Newspaper, such as those published by the Company, is printed on a special type of paper called "Newsprint". The newsprint available in the country are obtained. Being an essential commodity the distribution of newsprint is controlled by the Government through the Newsprint Control Orders which are framed from time to time in exercise of powers under the Essential Commodities Act, 1955.

5. Every Licensing Year, the Ministry of Information and Broadcasting, Government of India announces the Newsprint Allocation Policy. In terms of the said policy, the newspaper are required to submit applications in prescribed forms for newsprint quota to the Registrar of Newspapers for India, New Delhi and on receipt of the said applications, the Registrar of Newspapers allots both imported and indigenous newsprint of the basis of circulation, page-level and size of the paper. In the Newsprint Allocation Policy the Government allows certain wastage. Such waste was S% for imported and 9% for indigenous newsprint for 1980-81. From 1981-82 onwards the wastage has been fixed at 5% for both imported and indigenous newsprint and for the Licensing Year 1985-86 the policy has not yet been announced by the Government.

6. The Government of India by Notification No. 55/75 dated March 1, 1975 imposed Excise Duty at 1% ad valorem on sale of newspapers falling under Tariff Item No. 68. This duty on newspapers was, however, withdrawn by Notification No. 62/78 from March 1, 1978.

7. In the printing of newspapers, wastages occur for different reasons. Such wastages include - (a) Opening waste of newsprint, (b) Reel ends waste and (c) Floor waste.

8. The opening waste of newsprint occurs in the process of transportation and handing of newsprint reel. The top portion of such reels sometime get damaged. The reels are put on the reel stands of the rotary machine for printing purposes and if any damage is found on the surface of the newsprint reels, the same is stripped off to avoid any snapping during the run.

9. In the process of printing when the reel comes to an end, it is sometimes found that the paper close to the reel core is crumpled and is not suitable for printing purposes and such portion is, accordingly, left out. This is called reel ends waste.

10. The floor waste represents printing paper which is not useable since they are either over-inked or under-inked or damaged or when the printing is bad.

11. All the aforesaid wastages arise in the process of printing the newspaper and the sme are genuine and cannot be used again in the printing of newspaper.

12. In exercise of powers conferred by Rule 8(1) of the Central Excise Rules, the Central Government by a Notification No. 163/67-CE dated 21.7.67 as amended by Notification No. 72-76-CE dated March 16, 1976 exempted newsprint from the whole of the duty of excise leviable thereon;.

13. The petitioner company, incidentally, is the holder of an excise licence as it produces certain dutiable article such as process blocks, etc. Audit teams are sent regularly by the Central Excise Department to inspect the statutory books, documents and papers maintained by the Company in respect of the excisable articles produced by it.

14. In or about April 1985 the Company received a communication dated 11th April, 1985 from the Superintendent of Central Excise; Division I. Range 7, in which it was alleged that it had been noticed on scruyiny by the Audit team which visited the company that the different wastes of newsprint were sold to outside parties. It was alleged that according to the said Notification No. 163/67-CE dated 21.7.67 newsprint intended for use in the printing of newspapers was exempted provided that the waste arose in process of printing of newspaper. It was also alleged that are the name indicated, opening waste of newsprint, the reel ends of newsprint were not wastes arising in the process of printing of newspaper. According to the communication, duty was payable on these wastes and the Company-was asked to clarify the position (Annexure ''C'').

15. The Company gave a reply to the said show-cause notice (Annexure ''D'').

16. The Company was further asked by the Superintendent of Central Excise in May 1985 to furnish the total quantity of opening waste and the total quantity of reel ends waste sold by the Company along with the value of clearance for the

period from May, 1980 to December 1981 and January 1982 to May 1984. These particulars were supplied by the petitioner/Company by a letter dated July 23, 1985 (Annexure ''E'').

17. Thereafter, on or about 29th October, 1985 the Company received the impugned show-cause notice.

18. According to the petitioner/Company, Excise Duty is a duty on manufacture of goods and is charged from the manufacturer, the taxable event being manufactured. And that being so, the Company not being the manufacturer of the wasted portions, is not liable to pay any Excise duty. However in spite of that the petitioner having been directed to pay Excise duty on such waste, it has come up before this Court for redress under Article 226 of the Constitution.

19. According to the respondents in their affidavit-in-opposition, the petitioner is liable to pay excise duty on the wasted portions of the newsprint since such wastages did not occur in the process of printing of the newspaper and this is in terms of the Notification No. 163/67 dated 21.7.67, as amended subsequently.

20. Now, since the sole foundation of the claim of the respondents is the Exemption Notification No. 163/67 CE, dated 21.7.1967 as amended by Notification No. 72/76 dated 16.3.76, it may be useful at the outset to refer to the said notification, which is as hereunder :

Exemption to paper containing mechanical wood pulp. In exercise of the powers conferred by sub-rule (1) of rule 8 of the Central Excise Rules, 1944, and in supersession of the Notification of the Government of India in the M.F. (D.R.) No. 137/62 - CE, dated 13.6.1982, the Central Government hereby exempts all paper containing mechanical wood pulp amounting to not less than 50 per cent of the fibre content, falling under sub-item (1) of Item No. 17 of the First Schedule to the Central Excises and Salt Act, 1944 (1 of 1944), from the whole of the duty of exercise leviable thereon:

Provided that it is proved to the satisfaction of the proper officer, as defined in the Central Excise Rules, 1944, that such paper is intended for use in the printing of newspapers, text books or other books of general interest:

Provided further that the waste arising in the process of printing of newspapers, text books or other books of general interest, may be used for any other purposes without payment of any duty if the proper officer is satisfied that the waste is genuine and cannot be used again in the printing of the aforesaid articles.

Explanation. - For the purpose of this notification ''Newspaper'' means any periodical work, containing public news or comments on public news, which is printed at regular intervals of not more than one month and the printer, and publisher of which have before the District Magistrate, Presidency Magistrate or Sub-Divisional Magistrate concerned made and subscribed to a declaration under the Press and Registration of Books Act, 1867 (25 of 1867).

(Notification No. 163/67 CE dated 21.7.67 as amended by Notification No. 72/76 CE dated 16.3.76).

21. It need not be emphasized that excise duty is a duty on manufacture of goods, the taxable event being the manufacturer of such goods and that a duty of excise is primarily a duty levied upon a manufacturer or producer in respect of the commodity manufactured or produced.

22. Obviously, therefore, the beneficiary of an exemption notification is the manufacturer or producer upon whom the duty is levied and not consumer of the goods pure and simple.

23. The impugned notification, as referred to above, is also no exception to it as it will appear from its analysis which follows.

24. The first part of the notification simply exempts newsprint from the whole of the excise duty leviable thereon.

25. Then comes the first proviso, which makes such exemption subject (sic) the condition that the paper is intended for use in the printing of newspapers, text books or other books of general interest.

26. There is no doubt that newsprint manufactured is intended for such use since under the Newsprint Control Order, 1962 newsprint of any description cannot be sold to any person unless the sale to that person (sic) authorised by the Controller and "Consumer of Newsprint" u/s (sic) of the Order means a printer or publisher of newspapers, periodicals, text books or books of general interest who use newsprint.

27. The primary condition as laid down in the first proviso thus being fulfilled automatically in view of the relevant provisions of the Newsprint Control Order, 1962, the manufacturer of newsprint gets full benefit of the exemption notification.

28. It need not possibly be mentioned that the first proviso has nothing to do with the consumer. This because the sole beneficiary of an exemption notification is the manufacturer and the condition laid down in the first proviso has to be fulfilled by the said manufacturer. As already seen, the consumer of newsprint can only be a printer or publisher of newspapers, periodicals, text books or books of general provisions newsprint is intended for such use as mentioned in the first proviso. Since the language used in the proviso is "intended for use", it is immaterial so far the manufacturer is concerned, as to how the consumer actually uses the newsprint after sale.

29. The second proviso, however, has some relation to the consumer, though remotely.

30. In the process of printing by the consumer some wastage of the newsprint may occur. The second proviso does not debar the consumer from selling such wastes to outsiders. But it provides that if such wastes are used for any other

purpose, or in other words, if something else is manufactured by such wastes, no excise duty would be leviable thereor(sic) provided the "proper officer" of the Central Excise is satisfied that the waste is genuine and cannot be used again in the printing of the prescribed articles.

31. In this connection, the most important words in the second proviso are "without payment of any duty" since these words clearly show that what is contemplated by the words "used for any other purposes", is manufacture of some other articles from the wasted portions of the newsprint since the question of payment of excise duty can arise only when something is manufactured. In other words, unless something is manufactured or produced out of the wasted portions, no question of payment of any excise duty would arise. Sale of the wastes may attract Sales Tax, Income Tax etc. and in case the wastes are not genuine, suitable action may possible be taken against the consumer under the Newsprint Control Order (sic) with the Essential Commodities Act, 1955 or any other statute, but (sic) such sale excise duty cannot be charge from the consumer under (sic) circumstances, since excise duty is essentially a duty on manufacturer a is leviable on a manufacturer or producer and not on a consumer unle(sic) of course, the manufacture takes place at the instance or on behalf the consumer.

32. Incidentally, reliance may placed on the decision of the Allahabad High Court in Hind Lamps Ltd. v. Union of India and Ors., 1978 FLT (378), where it has been held that if the goods have been manufactured on behalf of the consumer, then the customer will become the manufacturer and will be liable to pay excise duty while no duty can be demanded from the original manufacturer.

33. The general law on the point has been laid down by this Court in Electric Lamp (India) Pvt. Ltd. v. Collector of Central Excise, Calcutta, 1978 ELT (J 84) where it has been held that the liability to pay excise duty rates only on the manufacturer or the producer and not on purchaser.

34. Similarly, it has been held by the Delhi High Court in Sulekh Ram & Sons. v. Union of India & Ors., 1978 ELT (J 525) that the incidence of excise duty is in on the manufacturer or the producer and not on the person to whom the manufacturer or the producer sells the goods.

35. Having thus explained the scope of the relevant exemption notification, it may now be considered how far the impugned show cause notice is sustainable in law.

36. The relevant portion of the Show-Cause notice is as hereunder :

Office of the Assistant Collector of Central Excise : Cal. "1" Divn. 169, A.J.C. Bose Road : (C.R. Building) : 6th Floor : Calcutta - 14. C. No. V(3)(68) 118/Cal. 1/85/7335 dated : 3.10.85.

Show cause

Demand Notice.

To M/s. The Statesman Ltd., 4, Chowringhree Square, Calcutta - 700001

Whereas it appears that M/s. The Statesman Ltd., 4, Chowringhee Square, Calcutta -700001 (hereinafter referred to as the said assessee) holder of Central Excise Licence in form L-4 No. 19 RSHES/T.C. - 68/Cal. 11/75 dated 1.4.75 for the manufacturer of excisable goods falling under Item No. 6811. I process blocks) of the First Schedule to the Central Excise and Salt Act, 1944 have contravened the provisions of Rules 1944 (hereinafter referred to as the said Rules) inasmuch as the said assessee are receiving indigenous newsprint falling under T.I. 17 of Central Excise Tariff from different factories for manufacture of newspaper without payment of duty in terms of notification No. 163/67 dated 21.7.67 as amended. According to the said notification newspaper intended for use in the printing of newspaper are exempted. The waste may be used without payment of duty if the proper officer is satisfied that the waste is genuine and cannot be used again in the printing of the aforesaid articles. Therefore, it appears that waste must arise in the process of printing newspaper. From the very name, i.e. opening waste of newsprint and reel ends of newsprint indicates that they are not wastes arising in the process of printing newspaper as former represents the defective newsprint found at the time of opening the reel and later represents the ends of the reel which cannot be used for printing. And these wastes were sold by the assessees in the market by suppressing the fact of such sale to the department and without submitting any declaration to that effect. As such, the said assessee are not entitled to get the benefit of exemption as stipulated under Notification No. 163/67-CE dated 21.7.67 as amended and thereby evaded payment of C.E. duty in the tune of Rs. 19,29,583.23 (Basic Rs. 18,37,698.34 + Special Rs. 91,984.89) for the period from May 80 to May 85).

37. It will appear that in the said show-cause notice the petitioner has been described as the "said assessee", which prima facie, is wrong since the petitioner company, a mere consumer of the newsprint, cannot be an assessee of excise duty in respect thereof.

38. As regard to the wasted portions of the newsprint, it has been stated in the show-cause notice that "this waste was sold by the assessee in the market by suppressing the fact of such sale to the department and without submitting any declaration to that effect and as such, the said assessee is not entitled to get the benefit of the exemption as stipulated under Notification No. 173/67-CE dated 21.7.67 as amended and thereby evaded payment of Central Excise duty....."

39. In view of thes scope and amplitude of the relevant exemption notification, as already discussed, it will clearly appear that the show-cause notice demanding Central Excise duty from the petitioner, based on total misconception of the said notification. It is really unfortunate that the Central Excise authorities, who have to deal with innumerable Central Excise cases and are supposed to know the basic principles of the law of Central Excise, made a total confusion by

mentioning in the show-cause notice that the petitioner is not entitled to get the benefit of the exemption notification. It is a trite knowledge that since excise duty is a duty on manufacture, of goods and is leviable on the manufacturer or producer, the sole beneficiary of an exemption notification issued in exercise of the power under Rule 8(1) of the Central Excise Rules, is the manufacturer or producer and not the consumer.

40. The petitioner is merely a consumer of the newsprint and not its manufacturer. Having purchased the newsprint for valuable consideration it is open to the petitioner to sell the wasted portions thereof to outsiders whether such wastes occur in the process of printing or not and for such sale, it is not at all necessary to keep the Central Excise authorities informed.

41. The second proviso to the exemption notification, as already referred to earlier, has no direct application to a consumer. It is only when the wasted portions are used for manufacture of something else that the Central Excise authorities come into the picture for ascertaining whether the waste is genuine and this is again for the sole purpose for determining whether the articles manufactured from the waste would be dutiable or not. The question whether the wastes occurs in the process of printing or not is rather immaterial so far the instant case is concerned. This is for the simple reason that there is no bar to the sale of newsprint-waste to outsiders. It is only when such waste is used in the manufacture of some other articles that the second proviso to the exemption notification springs into action.

42. As already stated, the petitioner for selling the newsprint waste may be liable to sales tax, income tax etc. and in case the waste is not genuine, the concerned authority may possibly take action against the petitioner under the Newsprint Control Order, 1962, read with the Essential Commodities Act, 1955. But it passes one''s comprehension how for such sale of the waste, the petitioner can be held liable for payment of excise duty.

43. Considering the facts and circumstances above, I am in complete agreement with Mr. Gupta, the learned Counsel representing the petitioner, that the impugned show-cause notice is absolutely malafide and without jurisdiction.

44. Mr. Gupta also contended that the Assistant Controller, Central Excise, Calcutta who issued the impugned show-cause notice (Annexure ''A'') is not the "proper officer" to issue the said notice within the meaning of Rule 2(XI) of the Central Excise Rules, 1944 since the premises of the producer or any person engaged in the process of production of or trade in newsprint, is not situate within his jurisdiction, the manufacture of the newsprint having taken place in South India.

45. But this point, in my view, is not at all relevant since the impugned show-cause notice is prima facie, ultra vires the Central Excise and Salt Act, 1944 and is the outcome of total non-application of mind.

46. As a matter of -fact, Mr. Ghoshal the learned Counsel representing the respondents, had some difficulty in supporting the show-cause notice whole heartedly in view of the basic principles of the Central Excise law that excise duty is a duty on manufacture of goods and the taxable event is also the manufacture and that duty is leviable on the manufacturer or producer of the article and not on the consumer.

47. Mr. Ghosal, however, tried to take the benefit of Chapter X of the Central Excise Rules, 1944. But, unfortunately, the said Chapter, which relates to remission of duty on goods used for special industrial purposes, has no manner of application to the facts of the instant case since the petitioner is not at all liable to payment of any excise duty so far newsprint is concerned.

48. Mr. Ghosal''s further contention was that it was not open to the petitioner to challenge the show-cause notice under Article 226 of the Constitution without exhausting the normal remedies available to it.

49. It appears that after the instant writ petition was filed the adjudication proceeding was allowed to continue by this Court and it is not disputed that the said proceeding has since been concluded and only the final order remains to be communicated to the petitioner.

50. But that, in my view, is practically of no consequence. The question is whether the petitioner could challenge the show-cause notice under Article 226 of the Constitution without availing itself of the remedies provided by the statute, namely, the Central Excise and Salt Act, 1944. It is now well-settled that if a show-cause notice has been issued without jurisdiction by the Central Excise Officer, a writ could issue without calling upon the assessee to exhaust his remedies. And in the instant case, the show-cause notice as already seen, is absolutely without jurisdiction. Moreover, as held by the Supreme Court, in L. Hirday Narain Vs. Income Tax Officer, Bareilly, that where the petitioner files a writ petition instead of availing of the statutory remedy and the High Court entertains the petition and gives hearing on merits, the petition cannot thereafter be rejected on the ground that the statutory remedy was not availed of. In the aforesaid view of the mater, the writ petition succeeds and the respondents are directed by the issue of a writ in the nature of Mandamus to withdraw, recall and cancel the impugned show-cause notice dated October 3, 1985, being Annexure ''A'' to the writ petition and to refrain from Riving any effect or further effect thereto or taking any action thereon.

There will be no order for costs.

