

(1989) 11 MAD CK 0017
In the Madras High Court
Case No : W.A. No's. 803/83 and 404/84

T.I. Miller Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 15-11-1989

Acts Referred:

Central Excise Rules, 1944 — Rule 10, 173D, 8
Central Excises and Salt Act, 1944 — Section 11A
Customs Act, 1962 — Section 11C

Citation : (1991) 53 ELT 214

Hon'ble Judges : Sathiadev, J;A.S. Anand, J

Bench : Division Bench

Advocate : S. Govindaswamy Nathan, for E.S. Govindan and S. Anbumani, for the Appellant; T. Somasundaram, Addl. Central Govt. Standing Counsel, for the Respondent

Judgement

Sathiadev, J.—These Writ Appeals are preferred against the order in W.P. No. 1024 of 1981 dated 20-7-1983, W.A. No. 803/83 is filed

by the Writ Petitioner, whereas the latter appeal W.A. No. 484/84, is by the respondents therein.

2. The Writ Petition was filed against the order dated 5-2-1981 of the second respondent (ranking of parties as in Writ Petition) confirming the

demand for Rs. 8,79,449.13, substituting the original demand for Rs. 7,09,237.84. The petitioner company is engaged in the manufacture of cycle

lamps which fall under Item 68 of the I Schedule to the Central Excises and Salt Act, 1944, hereinafter referred to as "the Act". As required under

Rule 173-D of the Central Excise Rules, hereinafter referred to as "the Rules", the company was filing classification lists for the goods

manufactured and cleared by them. They were being approved from time to

time. Treating cycle lamps as part of cycle, under Rule 8 exemption was granted for cycles and parts thereof under Notification No. 55 of 1975 as amended by Notification No. 102 of 1980 dated 18-6-1980.

Second respondent issued a show cause notice dated 24-10-1980 claiming that the classification lists submitted were approved upto to 18-6-1980 under Notification No. of 1979 dated 1-3-1979, that under Notification No. 55/75 as amended by Notification No. 192/80 dated 18-6-1980, it is considered that dynamos are not part of the cycle eligible for exemption and that petitioner has to show cause within one month from the date of receipt of the notice as to why the exemption given in the said notification should not be denied to them and why the differential duty for the clearance made in the last six months prior to the show cause notice should not be collector under Rule 10. Petitioner replied to this notice on 19-11-1980 pointing out that dynamos are designed for use only in cycle, and in commercial parlance, they are treated as cycle parts and that a similar manufacturer of dynamos like M/s. Sankyo Ltd. was not paying duty and hence the show cause notice is illegal. After giving a personal hearing, the impugned order came to be passed.

3. The Learned Judge, held that it is only the popular commercial view that has to be accepted and acted upon relating to classifications, and when cycles can be used without dynamos, it is not part of the cycle, but proceeded to hold that as the show cause notice had pre-judged the matter, it is bad in law and, consequently allowed the writ petition with liberty to the respondents to proceed afresh, if it is permissible in law. On being aggrieved with such views taken, these writ appeals are preferred.

4. Though not only for the period covered by the writ appeals but for subsequent periods as well, on demands raised, the petitioner had filed W.P.

Nos. 8709 and 8710 of 1984; in view of Notification No. 3 of 1986 dated 16-1-1986 issued u/s 11C of the Act, directing that no duty shall be required to be paid in respect of cycle accessories for the period from 19-6-1980 to 16-3-1986, those two writ petitions had to be dismissed as having become infructuous. Under the show cause notice dated 24-10-80, the relevant period begins from 24-4-1980. By notification dated 16-1-1986, the demand of duty having been given up with effect from 19-6-1980, these writ appeals now cover only a period of 86 days, i.e. from

24-4-1980 to 19-6-1980. The limited point involved is, whether the show cause notice as issued, could be set aside on the grounds relied upon by the learned Judge, for this period.

5. Mr. T. Somasundaram, learned counsel for respondents, would submit that no part of the show cause notice had resulted in pre-judging of the issue by the authority, and it only refers to what was proposed to be done, because cycle lamps and parts thereof are not considered as parts of cycle eligible for exemption under the three notifications, above referred to. Bearing in mind that the lists submitted were approved upto 18-6-1980, based on these notifications; and now that it is considered that the approach hitherto made would not be available on a proper understanding of the nature, of goods manufactured by the petitioner; a revised thinking of this kind in relation to imposition of duty as disclosed therein can never be treated as pre-judging the issue. Neither, petitioner had been called upon to show cause, as to why the view proposed to be taken, could not be applied, on and from 24-4-1980. When the show cause notice is explicit about proposed action to be taken in the light of what is being considered as just and proper, the learned Judge was in error in holding that there was pre-judging of the matter. Unless the recipient of the show cause notice is told as to what was the cause for a revision being made, he would not be able to defend himself properly. Indicating in a show cause notice of the revised thinking and giving an opportunity to clarify as to why the revised view should not be followed or adopted, could never be considered as prejudging the issue involved in the show cause notice.

6. A careful reading of the show cause notice would show that it does not in any manner spell out that the authorities have already concluded the issue against the petitioner. As rightly contended by learned counsel for the respondents, it only spells out the revised thinking of the concerned authority pertaining to exemption; and this aspect requires necessarily to be communicated to the petitioner and without which a valid show cause notice cannot be issued. If a bald show cause notice is issued without reference to what had been done in the instant case then that would be valid ground for the petitioner to come to Court and plead that it is devoid of particulars and disables an effective opportunity of putting forth valid

objections. Therefore, the submissions made by learned counsel for the respondents, as above stated deserve acceptance.

7. The next point is that, in the show cause notice, the demand having been made retrospectively, with effect from 24-4-1980, it is illegal to the

extent for the period proceeding 24-10-1980. Learned counsel for petitioner, Mr. Govind Swaminathan, submits that the second respondent had

no jurisdiction to make the demand retrospectively, whereas Mr. T. Somasundaram, learned counsel for the respondents, would submit that Rule

10, which is now Section 11-A and which had been incorporated in the Act in 1978, enables the Central Excise Officer to collect duty for a

period of six months prior to the issue of the show cause notice, in such of the cases where the duty has not been levied or short levied or short

paid or erroneously refunded. Hence, he submits that, such a levy authorised by law cannot be treated as a retrospective demand made for a

period preceding the show cause notice.

8. To counter the above submission, learned Counsel, Mr. Govind Swaminathan would first refer to 1987 (14) ECC 157, which is a decision of

the Tribunal. It was contended by the assessee that the Excise authority could not go back six months from the date of issue of show cause notice,

even assuming that the Department's stand of classification was correct. It was held that the revised classification cannot be made applicable

retrospectively i.e. the demand for duty in terms of the revised classification can be enforced only from the date of the show cause notice and not

for any earlier period. He would then refer to 1985 ECR 1860 which is also a decision of the Tribunal and it was held therein that, once a

classification list is approved and till the first show cause notice was given, the demand for additional duty could be only effective from the date of

issue of show cause notice and could not go back to even six months from the date of show cause notice. These decisions of the Tribunal are

contrary to the view expressed by the Supreme Court in Tata Iron and Steel Co. Ltd. Vs. Union of India (UOI) and Others, . Regarding the scope

of Section 11A, it was held that this provisions enables a demand to be made only for a period of six months prior to the service of show cause

notice and, therefore, the demand made for payment of excise duty against the appellant therein was confined to the said period preceding the

show cause notice. Whatever be the earlier approach made by the Department relating to levy of duty, when a revision could be made in

accordance with the provisions of the Act for a period of six months proceeding the date of issue of show cause notice; such a demand covering

the said period cannot be treated as illegal. Hence the plea that it would tantamount to a retrospective claim, carries no substance.

9. On the applicability of the principles of res judicata or estoppel, in J. K. Synthetics Ltd. and another Vs. Union of India and others, , it was held

that these principles are not applicable to tax matters and what had been applied for one assessment period will not be final and conclusive for

subsequent assessment periods.

10. One other point taken by the petitioner is that, once the classification list is approved, it cannot be varied by the same authority and it could be

set aside only by a superior authority. For the period now involved in these appeals, it is claimed that it is only the classification list as approved

which could be acted upon, and by invoking Section 11A, a different stand cannot be taken by the issue of a show cause notice. In dealing with

the powers of Excise authorities to collect duty, it was held by the Supreme Court in AIR 1989 617 (SC) as follows :-

The next submission on behalf of the appellant is that the classification lists had been approved earlier and the Excise authority was estopped from

taking a different view. Plainly there can be no estoppel against the law. The claim raised before us is a claim based on the legal effect of a

provision of law, and therefore, this contention must be rejected.

In Southern Steel Ltd. Vs. Union of India (UOI) and Others, the High Court of Andhra Pradesh held as follows :-

It is also true that the mere fact that the authorities had not questioned the position taken up by the petitioner does not prevent them from levying

duty wherever they came to the conclusion that the description in the classification list is not correct and according to the correct description duty is

livable"".

Learned Counsel for the petitioner would refer to Nat Steel Equipment Pvt. Ltd. Vs. Collector of Central Excise, Excise and Customs cases 457]

to claim that such a view cannot be sustained in view of what had been held in the said decision. It was a case wherein the Tribunal came to the

conclusion that there was no intention to evade payment of duty by the details set out in the Classification List. Hence, it was held that on the facts

and circumstances of the case, the Tribunal's direction that the modification of the classification list could only be prospective and not retrospective

was upheld, taking into account the peculiar facts and circumstances of the same. Hence, in respect of the period of six months which could be

covered u/s 11A, the existence of an approved classification list, would not be a bar to impose and collect appropriate duty.

11. As stated earlier, the Learned Judge held that the meaning ascribable in respect of a particular item of goods for purpose of classification,

could be only the popular commercial view, as held in *State of Uttar Pradesh and Another Vs. Kores (India) Ltd.*, , and since a cycle can be used

without a dynamo it is not part of a cycle. Further as to how the use of a dynamo in relation to a cycle has been understood by the Government of

India for the purposes of this Act and whether it was treated as an accessory or as a cycle part, the Notification No. 3/86-Central Excise, dated

16-1-1986 provides sufficient guidance. It has chosen to grant relief for cycle accessories for the period mentioned therein. This notification had

not treated dynamos as cycle part but only as an accessory. By availing the benefit thereunder, it had resulted in the two writ petitions being

dismissed, as having become infructuous and withdrawn. Therefore, for the period involved in this appeal, dynamos cannot but be treated as an

exemption by relying upon Notification Nos. 54/75, 86/79 and 102/80. It is, therefore, liable to pay duty for the period from 24-4-1980 to 15-6-

1980 and to this extent alone, the impugned orders are upheld. Hence, to this extent, F.A. No. 484/84 is allowed and W.A. No. 803/83 is

dismissed. No costs.