

(2002) 12 MAD CK 0098

In the Madras High Court

Case No : Writ Petition No. 3900 of 1998

Titanium Tantulum Products Ltd.

APPELLANT

Vs

Customs Central Excise (Gold Control Appellate Tribunal) and
Assistant Commissioner, Central Excise

RESPONDENT

Date of Decision : 01-12-2002

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2003) 162 ELT 85

Hon'ble Judges : P.K. Misra, J

Bench : Single Bench

Advocate : M.S. Krishnan, for the Appellant; S. Balaji, for J. Madanagopal Rao, for the Respondent

Final Decision : Dismissed

Judgement

1. Petitioner has challenged the order passed by the Customs Central Excise & Gold (Control) Appellate Tribunal in appeal confirming the orders of the other authorities in proceedings under the Central Excise and Salt Act. The petitioner is a company engaged in manufacture of Titanium Annodes and chemical equipments. The titanium annodes etc. were allowed to be cleared on the basis of Classification List filed by the petitioner indicating that the items were coming under Chapter-84.79 of the Central Excise Tariff Act. Subsequently, the first respondent issued show-cause notices covering for the period from March to July, 1993, and from July, 1993 to December, 1993 indicating that the items should be re-classified under Chapter 81.08, 81.09 and 81.03 and not under Chapter-84, as approved earlier. The petitioner submitted replies refuting allegations made in the show-cause notices and justifying the inclusion of the items under Chapter-84. Apart from the aforesaid submission on merit, the petitioner also contended that initial classification having been accepted earlier, such classification could not be reopened unless the appropriate authority comes to a conclusion that there had been a change in the process of manufacture

subsequent to the approval of the earlier classification, or there had been a change brought out in the classification pursuant to any decision of the Tribunal, High Court or Supreme Court, that is to say, that there had been a change in the legal position, or that the assessee had suppressed certain material particulars which came to the notice of the Department subsequently. It has been, therefore, contended that in the absence of any such aspect, the authorities did not have any jurisdiction to reopen the classification merely because there had been subsequent change of opinion of the authority.

2. In support of the aforesaid contention, the petitioner had relied upon the decision of the Andhra Pradesh High Court reported in *Reckitt and Colman of India Ltd. Vs. Assistant Collector of Central Excise, Hyderabad*, . The aforesaid legal contention raised by the petitioner was not accepted by the authorities ultimately, the matter reached the Customs Central Excise & Gold (Control) Appellate Tribunal (in short, "CEGAT"). The CEGAT negated the contention of the petitioner and observed that in view of the decision of the Supreme Court reported in *M/s. Ballarpur Industries Ltd. Vs. Asstt. Collector of Customs and Central Excise and others*, , it was open to the authorities to issue show cause notice to reopen the proceedings u/s 11A of the Central Excise & Salt Act and the decision of the Andhra Pradesh High Court which had been rendered prior to the Supreme Court decision was inapplicable. The aforesaid order of the CEGAT confirming the orders of the lower authorities has been impugned in the present writ petition.

3. Learned counsel appearing for the petitioner has submitted that the observation of the Andhra Pradesh High Court that question of assessment can be re-opened only under certain circumstances as contemplated in the said decision, still holds good and in the absence of any such circumstances, it was not open to the authorities to reopen the proceedings.

4. The contention of the petitioner even though attractive on the face of it, cannot be accepted in view of the observations made by the Supreme Court in the decision already cited. In the aforesaid decision of the Supreme Court, the appellant therein had challenged the show cause notice issued under Rule 10, which at the relevant time *inter alia* provided that "when duties or charges have been short levied through inadvertance, error, collusion or misconstruction on the part of an officer, or through mis-statement as to the quantity, description or value of such goods on the part of the owner, or when any such duty or charge, after having been levied, has been owing to any such cause, erroneously refunded, the proper officer may, within three months from the date on which the duty or charge was paid or adjusted in the owner's account-current, if any, or from the date of making the refund, serve a notice on the person from whom such deficiency in duty or charges is or are recoverable requiring him to show cause to the Assistant Collector of Central Excise why he should not pay the amount specified in the notice." While considering the effect of the aforesaid rule it was observed in paragraph 5 as follows:

"The second contention urged on behalf of the appellant is that the Department having accepted the classification of goods and the price list year after year was estopped from questioning the same as Rule 10 of the Rules did not permit change in the classification list retrospectively. Reliance was placed on the decision of this Court in *M/s. Rainbow Industries (P) Ltd. Vs. Collector of Central Excise, Vadodara*, wherein this Court held that once the Department accepted the price list, acted upon it and the goods were cleared with the knowledge of the Department, then in the absence of any amendment in law or judicial pronouncement, the reclassification should be effective from the date the Department issued the show cause notice. The reason for it is, say their Lordships, clearance with the knowledge of the Department and not intentional evasion of duty. On this line of reasoning it was held in that case that the appellant was not liable to pay duty in respect of the past period prior to the issuance of show cause notice to the appellant. We find it difficult to persuade ourselves to this line of reasoning. Although, in that case the Court did not notice Rule 10 as it stood prior to 6th August, 1976 even though the show cause notice in that case was dated 16th October, 1976, reference was made to Section 11A of the Act which is more or less (substantially) the same. Under the said provision when any duty of excise is found to have been not levied or paid or has been short-levied or short-paid or erroneously refunded, a show cause notice could be issued on the person chargeable with the duty within six months from the relevant date requiring him to show cause why he should not pay the amount specified in the notice. The expression "relevant date" has been defined in clause (ii) of sub-section (3) of Section 11A. On the plain reading of the said provision as also Rule 10 as it stood prior to 6th August, 1976 the show cause notice which could be issued within the time limit prescribed under the relevant provision could only be in relation to the duty of excise for a period prior to the issuance of show cause notice. There could be no reason for the issuance of a show cause notice for the period subsequent to the notice as in that case the necessary corrective action could always be taken. But Rule 10 with which we are concerned as well as Sec. 11A to which a reference is made in the case of *RAINBOW INDUSTRIES*, the show cause notice which must be issued within the time frame prescribed in the said provisions must relate to a period prior thereto as the purpose of the show cause notice is recovery of duties or charges short-levied, etc. We, therefore, find it difficult to accept the contention that the ratio of the decision in *RAINBOW INDUSTRIES* is that P.K. Misra, J. under Sec. 11A past dues cannot be demanded."

5. In view of the aforesaid observation of the Supreme Court, the ratio of the decision of the Andhra Pradesh relied upon by the petitioner cannot be made applicable and it must be held that the decision of the Andhra Pradesh has been impliedly over-ruled by the aforesaid Supreme Court decision.

6. For the aforesaid reasons, I do not find any merit in this writ petition, which is accordingly dismissed. There will be no order as to costs. Consequently, W.M.P. No. 5893 of 1998 is closed.