

(1987) 04 AHC CK 0028

In the Allahabad High Court

Case No : Civil Miscellaneous Writ No. 734 of 1986

Triveni Structurals Ltd.

APPELLANT

Vs

Collector, Central Excise

RESPONDENT

Date of Decision : 09-04-1987

Acts Referred:

Central Excise Rules, 1944 — Rule 173B, 8(1)
Central Excises and Salt Act, 1944 — Section 11B
Constitution of India, 1950 — Article 226

Citation : (1987) 14 ECC 31 : (1987) 13 ECR 433 : (1987) 30 ELT 707

Hon'ble Judges : R.K. Gulati, J; K.C Agrawal, J

Bench : Division Bench

Judgement

1. Triveni Structural Limited is a public sector unit, being a joint enterprise of the Government of India and a party in Austria. It has filed this writ petition for quashing the orders of the Assistant Collector, Central Excise, Allahabad, dated September 1, 1984 and the Collector, Customs and Central Excise, New Delhi, dated July 11, 1986.

For appreciating the controversy involved in this petition, a brief reference to the facts would be necessary. The petitioner company carries on the business of fabrication and erection of steel structures. In the course of its business, the company has to fabricate pipes and penstocks from steel and plates and sheets, which are excise duty payable items.

2. In the year 1981-82 the duty payable under Tariff Item No. 68, which is a residuary item with the heading "All other goods not elsewhere specified" was 8% ad valorem. The petitioner submitted a classification list in advance for payment of excise duty under Rule 173B of the Central Excise Rules, 1944. The classification list submitted by the petitioner of the year 1981-82 showed pipes and penstocks as chargeable with excise duty under Tariff Item No. 68. The classification list was approved by the Assistant Collector and the payment of excise duty of this year was made in accordance with the Tariff Item No. 68 at

8%.

3. For the years 1982-83 and 1983-84 as well, the petitioner submitted classification lists indicating pipes and penstocks being covered by the residuary clause, that is, Tariff Item No. 68. On the pointing out of the Assistant Collector, the petitioners representative took back the classification lists for 1981-82, 1982-83 and 1983-84, and files other classification lists showing that excise duty was payable under Item 25 (15), which was in substance the same as former Tariff Item No. 26AA (4). Tariff Item 25 (15) was as under :-

"(15) Tubes and pipes and blanks One thousand rupees per therefore, of iron or steel, rolled, metric tonne plus the excise forged, spun, cast, drawn, annealed, duty for the time being leviable welded or extruded. on pig iron or steel ingots, as the case may be." 4. This was substituted with effect from August 1, 1983, and, as stated before, the item under which the duty was payable previous to the aforesaid amendment, was 26AA (4). This was exactly in the same language as Item 25 (15).

5. During the course of approval of the lists of these two years and of the subsequent year 1984-85 it transpired that pipes and penstocks, although, chargeable under Item 26AA (Tariff Item 25 after 1-8-1983), were exempted from duty if manufactured from duty paid plates, sheets, strips and skelps..

6. The petitioner, thereafter, moved an application for refund of duty on the ground that it was entitled to exemption from payment of excise duty on the penstocks and pipes. The following was the application moved by the petitioners.

"The refund claims is submitted on the following grounds:

Penstocks pipes are classified under Tariff Item 26AA vide Board's order No. 78/81, dated 4-8-1981 ECR/1981/2332/Now under Tariff Item 25 with effect from 1-4-1983, but the Central Excise Department had approved the classification list for the year 1981, under Tariff Item 68, and supplementary classification lists were submitted for years 1982, 1983 and 1984 accordingly, showing the penstock and pipes under Tariff Item 68. As desired by the Department, we have submitted the revised classification list showing penstocks pipes under Tariff Item 25 w.e.f 1-8-1983 but duty paid by mistake of law.

In view of the Notification No. 69/73, dated 1-8-1973 as amended by 16/76, dated 7-2-1976 and 208/83, dated 1-8-1983 as amended by Notification No. 38/84, dated 1-3-1984 the penstocks pipes are exempt from payment of Central Excise duty. Hence the duty paid on the penstocks pipes by mistake of law at the rate of 8% from 1-3-1981 to 28-2-1983 and 10% from 1-3-1983 to 31-10-1983 be refunded. The detailed chart showing the quantity cleared value of goods, rate of duty prevalent is enclosed for perusal and necessary action."

7. The Assistant Collector accepted the claim or refund in respect of the year 1984-85 as this claim in his opinion had been filed within six months, which is the period prescribed by Section 11B of the Central Excises and Salt Act, 1944.

The refund claimed by the petitioner with regard to the years 1981-82, 1982-83 and 1983-84 was rejected. The petitioner preferred an appeal against this order to the Collector of Central Excise (Appeals), New Delhi. The appeal was dismissed by the order dated 17-7-1986. The petitioner has come to this court for quashing of the two orders.

8. The fact that the petitioner did not claim in the years 1981-82 to 1983-84, to which it was entitled to under the notifications issued by the Central Excise from time to time to the effect that if penstocks and pipes had been prepared out of steel on which excise duty had already been paid, exemption would be available to the assessee, is not disputed.

9. The argument of the respondents was that u/s 11B, refund of any duty of excise could be made on an application being made before the Assistant Collector of Central Excise before the expiry of six months from the relevant date. The expression "relevant date" has been defined in Explanation (B) to Section 11B. The clauses relevant for our purposes are (e) and (f), which are quoted below :-

"(e) in a case where duty of excise is paid provisionally under this Act or the rules made thereunder, the date of adjustment of duty after the final assessment thereof,

(f) in any other case, the date of payment of duty."

10. The controversy, therefore, in the instant case is whether the Central Excise authorities were right in rejecting the prayer for refund on the ground of limitation. The claim of the petitioner, in our opinion, can be bifurcated into two parts. One in respect of 1981-82 regarding which classification had been approved by the Excise Department, which fact is admitted in paragraph 10 of the writ petition, and the other of the years 1982-83 and 1983-84. In respect of the latter two years, the classification lists were pending for approval. So far as the year 1984-85 is concerned, it has already been noted above that refund was given to the petitioner on the same ground which is the basis of claim for the years 1982-83 and 1983-84.

11. As the classification list of the year 1981-82 had been approved and payment was also made by the petitioner long time back, the claim of this year of the petitioner for refund cannot be justified on account of Section 11B, which prescribes the period of six months for making an application. In fact, the petitioner made the claim for refund of this year when it was asked to submit a fresh list of classification for the year 1982-83 and 1983-84, showing an excise duty on pipes and penstocks to be payable under Item 26AA and after 1-8-1983 under Item 25. At that time, the matter with regard to the year 1981-82 had become final. There was no occasion for the petitioner to submit a fresh classification list in respect of the year 1981-82. No relief in respect of the year 1981-82 is admissible to the petitioner not only because the claim for its refund had not been made within six months, but independently of it the High Court would not be justified under Article 226 of the Constitution to assist a party

which prefers a belated writ petition and offers no justification or explanation for the delay.

12. So far as the years 1982-83 and 1983-84 are concerned, the classification list of these two years were pending for approval before the Assistant Collector, Central Excise and till they had not been approved, final liability could not be said to have been adjudicated upon or decided, was urged by the counsel for the Union of India since penstocks and pipes were already classified Tariff Items, no application for approval was required to be made under Rule 173B of the Central Excise Rules, and, as such, pendency of the approval of the classification list and its disposal thereafter could not afford any cause of action to the petitioner to make a claim for refund. The period of six -months u/s 11B had to be calculated with effect from the date of payment of duty. It was further submitted that so far as the Excise authorities were concerned, they could order for the refund of the said duty if the claim for the same had been preferred within six months and they had no power to condone the delay in moving such an application, if filed after six months.

13. The proposition argued by the counsel for the union that the limitation of six months applied the claims for refund is not disputable inasmuch as an authority created by a Statute has only those powers as are conferred upon it. It cannot usurp the powers which the legislature does not choose to confer upon it. In the instant case, however, the averment of the petitioner that classification lists had been submitted for approval finds support from the order passed by the Assistant Collector, Central Excise, as it has not been said anywhere either in the counter-affidavit or in the order that the classification list did not require approval as the items in question had already been classified under Tariff Item 26AA and Item 25.

14. We, in the peculiar facts of this case, are not required to go into the question whether classification list needed approval of the proper officer under Rule 173B of the Central Excise Rules. The position with regard to it may be assumed to be correct. It was during the course of discussion with the Assistant Collector that the fact of the classification list being wrong under Tariff Item 68 came to the notice of the petitioner. The petitioner at that time learnt that penstocks and pipes should have been classified for these years under Tariff Items 26AA and Item 25. The Assistant Collector on submission of a fresh classification list approved the same by holding :

"Those penstock pipes are fabricated out of duty paid steel plates and sheets. Since these are production of iron/steel it was rightly classifiable under Tariff Item 26AA earlier and under Tariff Item 25 now. The party should have classified them appropriately for the particular years under Tariff Item 26AA/25."

The exemption claimed by the petitioner on the basis of Annexure "IV, which runs as under, has also not been disputed by the Union Government.

"Exemption to pipes or tubes made from duty paid iron or plates, sheets etc. In exercise of the powers conferred by Sub-rule (1) of Rule 8 of the Central Excise

Rules, 1944, the Central Government hereby exempts iron or steel products falling under Sub-item (iv) of Item No. 26AA of the first Schedule to the Central Excises and Salt Act, 1944 (1 of 1944) and specified in column (2) of the Table hereto annexed, from the whole of the duty excise leviable thereon subject to the conditions laid down in the corresponding entries in column (3) thereof.

TABLE

S.No.	Description	Conditions	1.	2.	3.
			1.	Iron pipes, cast	If made from iron in any crude form or spun. falling under Item No. 26 of the said First Schedule on which the appropriate duty of excise has already been paid."

15. Confining our judgments to the facts of the present case, it appears to us that whereas the claim for refund of the year 1981-82 was not entertainable, the same in respect of the subsequent years, that is, 1982-83 and 1983-84 was wrongfully rejected by the Central Excise Authorities.

16. Even if we were to hold that the claim for refund having been preferred after six months was liable to be rejected, we would consider the present as a fit case for exercise of the powers vested under Article 226 of the Constitution. If duty has been paid under a mistake, as occurred in the instant case, the claim for repayment of refund is entitled to succeed. As to when should Court exercise the power under Article 226 of the Constitution would depend on the facts and circumstances of each case and as it was neither easy nor desirable to lay down the cases exhaustively for universal application, we cannot lay down the same. As it appears to us that the refusal to grant refund to the petitioner would be harsh, inequitable and unjust on the ground of delay, we would consider it to be in the interest of justice to direct the respondents to refund the same for the two years 1982-83 and 1983-84.

17. In Shiv Shankar Dal Mills and Others Vs. State of Haryana and Others, the Supreme Court was called upon to consider the refund of illegal recovery of market fee from dealers by the Market Committee. It held that in exercise of flexible power granted by Article 226, it will be open to the Court to pass such order as public interest dictates and equity projects. In that connection, the Supreme Court further held :

"Where public bodies, under colour of public laws, recovery people's moneys, later discovered to be erroneous levies the dharma of the situation admits of no equivocation. There is no law of limitation, especially for public bodies, on the virtue of returning what was wrongly recovered to whom it belongs. Nor is it palatable to our jurisprudence to turn down the prayer for high prerogative writs, on the negative plea of "alternative remedy, since the root principle of law married to justice, is ubi jus ibi remedium."

18. For what we have said above, we partly allow the writ petition and quash the orders of the Assistant Collector, Central Excise, dated 1-9-1984 and the Collector, Customs and Central Excise (Appeals), New Delhi, dated 17-7-1986, for the years 1982-83 and 1983-84, and further direct the Central Excise to refund the excise duty to the petitioner to which it may be found entitled to.