
(1976) 11 MP CK 0010

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No 1197/75

Universal Cables Ltd.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 02-11-1976

Acts Referred:

Central Excise Rules, 1944 — Rule 173I, 173K, 56A, 56A(2), 56A(3)(1)(b)
Central Excises and Salt Act, 1944 — Section 40(2)

Citation : (1978) 2 ELT 495 : (1978) ILR (MP) 406

Hon'ble Judges : S.M.N. Raina, J;G.P. Singh, J

Bench : Division Bench

Final Decision : Allowed

Judgement

G.P. Singh, J.—The petitioner, Universal Cables Ltd , is a company which carries on the business of manufacturing various limits of wires and cables in its factory at Satna. The petitioner also owns a Properzi Mill in which it converts aluminium ingots into aluminium redraw rods technically known as properzi rods. By a letter dated, 11th May, 1970 the Assistant Collector, Central Excise, Jabalpur, granted to the petitioner permission to avail of the procedure of Rule 56-A of the Central Excise Rules, 1944, made under the Central Excises and Salt Act. 1944. Between 24th September, 1970 to 3rd November, 1970 the petitioner received 12 consignments of duty paid aluminium ingots manufactured by the Hindustan Aluminium Co. Ltd. (Hindalco) for conversion into properzi rods. These consignments were sent to the petitioner by Messrs Metal Rolling Works Private Ltd., Bombay, for and on behalf of Messrs Lallu Bhai Amichand Private Ltd., Bombay. The Proper Officer, Central Excise, permitted the petitioner to take proforma credit of the duty paid on these consignments. After conversion of the ingots received under these consignments, the properzi rods were supplied to Messrs Lallu Bhai Amichand. The assessments of duty on properzi rods so manufactured were completed in 1970. In these assessments, the proforma credit of duty taken by the petitioner under Rule 56-A was not disputed. Nearly four years thereafter, the Collector of Central Excise, Nagpur issued on 15th

February, 1974, twelve show cause notices to the petitioner in which it was stated that the proforma credit of duty taken by the petitioner in respect of the aforesaid 12 consignments of ingots was inadmissible. The Petitioner was required to show cause why a penalty under Sub-rule (4) of Rule 56-A be not imposed and why the unauthorised inadmissible proforma credit amounting in all to Rs. 1, 24, 144.45 be not recovered from the petitioner. The petitioner replied to the show-cause notices. The Collector by 12 orders passed on 8th July, 75 imposed penalty to the due of Rs. 24,000/- (Rs 2000/- in each case). The Collector further disallowed the proforma credit of duty Rs 1,24,144.52 and ordered its recovery by adjustment in the petitioner's account current with the Collector and failing that by cash recovery from the petitioner. The petitioner thereafter filed this petition under Article 226 of the Constitution challenging the aforesaid orders and show cause notices.

2. Rule 56-A as amended by Rule 173-K and is so far as relevant reads as follows :

* * * *

3. By a Trade Notice No. 55/70, dated 20th July, 1970, the Collector of Central Excise communicated to the manufacturers the procedure laid down by the Central Board of Excise and Customs with regard to the movement of duty-paid material in the context of Rule 56-A. Sub-rule (3) (1) (b) of Rule 56-A requires that a manufacturer who is granted permission under Sub-rule (2) shall bring to the factory the duty-paid material in original packing "under the cover of A.R.I, or such other document as may be approved by the Central Board of Excise and Customs in this behalf" evidencing the payment of excise duty or the countervailing duty. The documents approved by the Board in this connection are the original Gate Pass in Form G.P.I, and failing that a certificate issued in accordance with the procedure given in the Trade Notice. The Gate Pass in form G.P.I, referred to here is the original Gate Pass of the primary manufacturer evidencing payment of duty and showing the name of the receiving manufacturer working under Rule 56-A as consignee. In a case where the consignment of duty-paid material moves first to another consignee and thereafter to a manufacturer working under Rule 56-Ar obviously the original Gate Pass in Form G.P.I, showing the name of the manufacturer working under Rule 56-A as consignee cannot be produced. In such cases, the instructions contained in the Trade Notice require production of a certificate from the Superintendent of Central Excise having jurisdiction over the factory or over the godown from where the goods are supplied to the manufacturer working under Rule 56-A.

Further, Clause 7 of these instructions reads as follows:-

Where a manufacturer working under Rule 56-A receives duty paid materials or component parts without the cover of gate pass or a certificate mentioned above, the goods may be allowed to be taken in the stock of the receiving factory and also taken in use for further manufacture on the authority of an invoice issued by

the supplier indicating the particulars of the original gate pass and/or the factory that he has applied for a certificate. In such cases proforma credit of duty may not be allowed until and unless gate pass G.P.I, or the certificate is produced. If the gate pass G.P. 1 or the certificate is not produced within one month of the receipt of the goods by such manufacturer, grant of proforma credit may be refused by the Superintendent having jurisdiction over such manufacturer after giving him an opportunity to explain the delay."

4. A perusal of the impugned orders passed by the Collector goes to show that he was of opinion that it was obligatory on the petitioner in the circumstances of the case to produce a certificate of the jurisdictional Superintendent of Central Excise Bombay under Sub-rule (3) (1) (b) for entitlement of the proforma credit and that no other evidence to prove payment of duty could have been entertained under that Sub-rule. The Collector was further of opinion that as the petitioner had not produced before the proper officer at the time when it was permitted to take proforma credit in respect of the twelve consignments the documents referred to in Sub-rule (3) (i) (b), it was wrongly allowed proforma credit. The reasoning of the Collector in his own words is as follows :

"Since the party in his case neither received the questionable aluminium ingots direct from the producing factory on a valid gatepass nor have they produced the aforesaid certificate of the jurisdictional Supdt of C. Ex. of the despatching end (i.e. Bombay in the instant case) they have failed to prove the duty paid character of the material so received from a third party in the manner specified in Clause (b) of Sub-rule 3 (1) of rule 56-A *ibid*. As such in law, the party is not entitled for the proforma credit of Rs 1,24,144.52 so taken in their R.G. 23 record in respect of the said 12 receipts of such material in question. Here I may make it clear that when the law specified only a specific type of evidence to prove the duty paid nature of any goods it is only that type of evidence which could prove such duty paid character thereof and no other collateral or circumstantial evidence could come to the help of the party as far as duty paid is concerned."

As earlier stated, the Collector imposed penalty under Sub-rule (4) of Rule 56-A for con-travention of Sub-rule (3) (i) (b) of the same rule and also order recovery of the amount of duty of which proforma credit was taken either by adjustment in the account-current failing that by cash recovery. This recovery was ordered under the second proviso to Sub-rule (2) of Rule 56-A.

5. The first contention raised by the learned counsel for the petitioner is the second proviso to Sub-rule (2) of Rule 56-A did not authorise the Collector to recover the amount of Rs. 1,24,144.52 taken as proforma credit on the ground that Sub-rule (3) (i) (b) was not complied with. In our opinion, this contention must be accepted. The second proviso to Sub rule (2) applies only when the duty paid by the primary manufacturer on the material received by the manufacturer working under Rule 56-A of which credit has been allowed to him is subsequently varied due to any reason resulting in. payment of refund to or recovery of more

duty from the primary manufacturer. In the instant case, the ingots received under the twelve consignments were manufactured by the Hindustan Aluminium Company Ltd. (Hindalco). The excise duty on the manufacture of ingots was paid by this company. It is nobody's case that the duty paid by Hindalco on the ingots was subsequently verified. It is plain from the language of the provision that it has no application on the facts of the instant case where the allegation is that the petitioner was wrongly allowed proforma credit by the proper officer because the petitioner had not complied with Sub-rule (3) (i) (b). It may be here mentioned that by a notification dated 14th August, 1976 Rule 56-A has been amended and Sub-rule (5) (i) has been added to meet such a situation. Sub-rule (5) (i), however, was not there when the Collector passed the impugned orders. The Collector relied solely on the second proviso to Sub-rule (2). In the return as also in arguments, no other provision of law has been pointed out to support the recovery of the amount taken as proforma credit. In our opinion, as the second proviso does not authorise Collector to order recovery of this amount, his order to that extent is plainly in excess of jurisdiction. It is not necessary to pursue this matter any further as Palshikar, who appeared for the respondents, plainly conceded that the Collector's order in this respect was in excess of authority.

6. It was also contended by the learned counsel for the petitioner that the penalty proceedings were barred by limitation u/s 40(2) of the Act. This point, however, is covered against the petitioner by our decision in *Universal Cables Ltd. v. Union of India and 6 others*, 1977 E.L.T. (J 92). In that case we have held that Section 40(2) of the Act has no application to penalty proceedings.

7. It was next contended by the learned counsel for the petitioner that the provisions of Sub-rule (3) (i) (b) were not mandatory but were only directory and that other documents or evidence not referred to in it could be admitted by the proper officer as proof of payment of duty. It was also submitted that even if the requirements of Sub-rule (3) (i) (b) were mandatory, on the facts of the case it must be held that these requirements were waived. It was further submitted that in any case, having regard to the admitted facts in this case, the collector acted unreasonably in the exercise of his statutory powers in imposing penalty and that his order was against the principles laid down by the Supreme Court in the case of *Hindustan Steel Ltd. v. State of Orissa* 1978 ELT(159).

8. We do not think it necessary to decide the question whether the provisions of Sub-rule (3) (i) (b) are mandatory or directory, or whether those provisions can be waived because, in our opinion, the learned counsel for the petitioner is right in his submission that on the admitted facts this was not a fit case where penalty should have been imposed and that the Collector exercised his statutory powers unreasonably contrary to the principles laid down by the Supreme Court in the case of *Hindustan Steel Ltd v. State of Orissa* (Supra).

9. * * * *

10. The permission granted to a manufacturer under Sub-rule (2) of Rule 56-A is

for the purpose of allowing him to avail credit of the duty already paid on the material or equipment component parts which he receives and which he uses in the manufacture of excisable goods. The requirement of Sub-rule (3) (i) (b) that the manufacturer shall produce the documents mentioned therein is for satisfying the proper officer that the material received was duty paid material. Now in the instant case it is not in dispute that the material received was not duty paid material. Although the documents referred to in Sub-rule (3) (i) (b) were not produced, but from other documents produced before the proper officer he was satisfied that the duty on the ingots had been paid and, therefore, the petitioner was allowed credit of that duty. That proper officer did not call for the documents mentioned in the sub-rule nor did he take any objection on that score. Had any objection been taken at that stage, the petitioner would have been able to produce the necessary certificates from the officer having jurisdiction over Messrs Lallu Bhai Amichand or Messrs Metal Rolling Works. Even at the time of making assessments which were all completed in 1970 under Rule 173-I no objection was taken by the assessing officer regarding any illegality or irregularity in taking proforma credit. The impugned notices in this case taking the objection regarding the non-compliance of Sub-rule (3) (i) (b) were issued in February, 1974, after a lapse of four years. It is clear that there was no fraud, collusion, or evasion of payment of duty. Even if it be held that the requirement of producing the specific documents referred to in Sub-rule (3) (i) (b) is mandatory, the omission in that matter was clearly bona fide. Even the proper officer was under the impression that the requirement was not mandatory otherwise he would have called upon the petitioner to produce the necessary document and would not have allowed it to take proforma credit of the duty. In these circumstances, it was wholly, unreasonable for the Collector to start penalty proceedings under Sub-rule (4) of Rule 56-A.

11. In *Hindustan Steel Ltd. v. State of Orissa* (Supra) the Supreme Court in the context of the Orissa Sales Tax Act, 1947, pointed out that an order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was quality of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. It was further observed that penalty will not also be imposed merely because it is lawful to do so, and that whether penalty should be imposed for failure to perform statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. It was also observed that even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute. These observations fully apply to the instant case.

12. On the admitted facts, it is quite clear that if at all there was only a technical

breach by the petitioner of Sub-rule (3) (i) (b), all along the petitioner acted honestly and there was no loss of revenue to the Government. Having regard to the principles of law laid down by the Supreme Court, it was not only unreasonable but a misuse of power on the part of the Collector to dig out a stale and innocuous default and to penalise the petitioner.

13. The petition is allowed. All the impugned notices and orders are quashed. The petitioner will get costs of this petition from respondent No 1 Union of India. Counsel's fee Rs. 500/-, if certified. The amount of the security deposit shall be refunded.