(1986) 11 BOM CK 0010

In the Bombay High Court

Case No : Writ Petition No. 1947 of 1985

Vapson Products and another — APPELLANT

Vs

Union of India and others — RESPONDENT

Date of Decision : 27-11-1986

Acts Referred:

Central Excise Rules, 1944 — Rule 9(1)

Citation : (1987) 11 ECC 200 : (1987) 15 ECR 138 : (1987) 27 ELT 608

Hon'ble Judges : M.L. Pendse, J

Bench : Single Bench

Judgement

1. The petitioner No. 1 is a partnership concern of which petitioner No. 2 is a partner. The petitioner No. 1 was engaged in the manufacture of processed Synthetic Organic Dyes which were sold under the trade name "Rapid fast" and "Rapidogen" classifiable under Item 14D of the First Schedule to the Central Excises and Salt Act, 1964 (hereinafter referred to as the "Act"). For the purpose of manufacture of these dyes, the firm used to purchase base dyes from the open market and those base dyes were supplied by the dealers on invoices handed over to the petitioners. The Central Government published Exemption Notification No. 180/61 on November 23, 1961 exempting the dyes specified in the Schedule thereto from the whole of the Excise Duty legible thereon, if such dyes were manufactured from any other dyes on which, interalia, the duty of excise had already been paid. The relevant portion of the Exemption Notification is as under :

"EXEMPTION NOTIFICATION

Exemption to certain dyes, if manufactured out of duty paid dyes. - In exercise of the powers conferred by sub-rule (1) of rule 8 of the Central Excise Rules, 1944, the Central Government hereby exempts dyes specified in the Schedule annexed hereto falling under Item No. 14D of the First Schedule to the Central Excises and Salt Act 1944 (I of 1944), from the whole of the duty of excise leviable thereon, if and only if such dyes are manufactured from any other dye on which duty of excise or countervailing customs duty had already been paid.

SCHEDULE

1. Solubilised Vats.

2. Rapid Fast Colours.

3. Rapidogens.

4. Fast Colour Salts.

(Notification No. 180/61-C.E. dated 23-11-1961)"

On November 25, 1961, the Collector of Central Excise, Bombay issued Trade Notice No. 175 in exercise of powers under Rule 223 of the Central Excise Rules, inter-alia, prescribing that the Manufacturers should produce documents to establish that the dyes used in the manufacture are duty paid, such as invoices in case of days purchased from the market for claiming advantage of the exemption notification. Identical trade notices were also issued by the Collector of Central Excise, Baroda. The petitioners claimed exemption and the Collector granted exemption for the period commencing from the year 1961 to 1972.

2. On August 8, 1972, the Superintendent of Central Excise issued show cause notice to the petitioners seeking an explanation as to how exemption under the Notification was secured without production of Gate Passes in respect of base dyes purchased in the open market. The petitioners were called upon of October 4, 1972 to produce necessary duty paying documents to claim exemption. The petitioners replied pointing out that the raw-materials were purchased from the open market and the petitioners were justified in presuming that the same were cleared after payment of excise duty. The Department did not take any further action in the matter.

Suddenly on October 6, 1983, the petitioners were served with show cause notice by the Superintendent of Central Excise, Division II, Bombay to show cause as to why duty from July 1981 to March 1982 should not be recovered as documents evidencing payment of Excise duties on base dyes were not produced and in spite of that exemption under the Notification was secured. The petitioners sent reply, but the Superintendent issued three further identical show cause notices. The petitioners sent a detailed reply and thereupon the Assistant Collector passed order on April 6, 1985 confirming the demand made by the show cause notices. The Assistant Collector held that the claim of the petitioners that there is a presumption that the goods purchased in the open market are deemed to be duty paid cannot be accepted. The Assistant Collector felt that in absence of documents establishing payment of duty, the advantage of notification cannot be claimed by the petitioners. The petitioners carried an appeal before the Collector of Central Excise (Appeals) Bombay, but the appeals came to be dismissed by order dated July 2, 1983. The Collector concurred with the finding and the conclusion recorded by the Assistant Collector, save and except confirming the demand under the show cause notices only for a period of six months. The petitioners have filed the present petition to challenge the legality of the orders passed by the two authorities below.

3. Shri Talyarkhan, learned counsel appearing on behalf of the petitioners, submitted that the entire approach of the two authorities below is erroneous and the conclusions are unsustainable. The learned counsel submitted that the Exemption Notification undoubtedly provides that the base dyes used in the manufacture by the petitioners must be such dyes on which Excise duty or countervailing duty has already been paid. The learned counsel submitted that it is not in dispute that the base dyes were purchased all along by the petitioners from the open market. Shri Talyarkhan urges that the petitioners are entitled to presume while purchasing base dyes in open market that excise duty as well as countervailing duty on such base dyes had already been paid. Shri Desai, learned counsel appearing on behalf of the respondents, on the other hand, urged that the findings and the conclusions recorded by the two authorities below are correct and are not required to be interfered in writ jurisdiction. Shri Desai urged that the authorities below have correctly held that the burden of establishing that the terms of the exemption notification are complied with was of the petitioners and that not having been done, the liability to pay duty cannot be avoided.

4. In my judgment, the orders passed by the two authorities below are clearly unsustainable. It is undoubtedly true that the burden to establish that the advantage of the exemption notification is available is on the petitioners, but it is impossible to concluded that the petitioners have not discharge the burden successfully. The petitioners have purchased the base dyes from the open market and the petitioners are perfectly justified in claiming that excise duty has been paid on the goods available in the market. Rule 9(1) of the Excise Rules, inter-alia, prescribes that the goods shall not be cleared from the factory gate until the excise duty leviable thereon has been paid. Indeed, it has been made a criminal offence, if the goods are removed from the factory without payment of excise duty for the purpose of sale in the open market. In face of these provisions, the customer who purchases from the open market is entitled to presume that the duty has already been paid. Shri Talyarkhan appropriately referred in this connection to the decision of the Calcutta High Court in the case of Calcutta Paper Mills Manufacturing Co. Vs. Customs, Excise and Gold (Control) Appellate Tribunal and Others, . The learned Judge held :

"It is not possible for the petitioners to discharge onus that the base paper purchased by the petitioners from the market is duty paid. The goods available in the market must be presumed to have been duty paid. It is absolutely impossible for a purchaser to know whether excise duty on the manufactured goods sold to the purchasers had already been paid by the manufacturers. If the purchaser has to satisfy the excise authorities that goods which he has purchased from the market suffers duty, it would impose a burden which no purchaser would be able to discharge. In the case of Sulekh Ram and Sons v. Union of India and others reported in 1978 E.L.T. 525, Delhi High Court has held that under excise system no goods can be removed from the place of manufacture without first paying the excise duty. Therefore, a purchaser can presume that the goods are duty paid. It would be incredible if the purchasers were required to ascertain whether Excise duty has already been paid by the manufacturer before the sale of such goods or not in as much as the purchasers have no means of knowing it."

I am in respectful agreement with the view taken by the learned Judge.

5. Apart from the presumption which arises in favour of the petitioners, the petitioners have produced before the Department documents to substantiate their claim that duty was paid on the base dyes purchased from the open market. The petitioners have produced invoices in respect of the purchase and that was the requirement prescribed by the Collector of Central Excise by publication of trade notice dated November 25, 1961. The trade notice, inter-alia mentions :

"Such manufacturers should produce to the Central Excise Officers on their visits to the factories the necessary documents to establish that the dutiable dyes used in the manufacture of processed dyes, have been brought from outside, such as invoices in case of dyes purchased from the market. x x x x"

The petitioners, not only, merely produced the invoices in respect of the purchase from the open market, but also produced the certificates secured by the petitioners from various dealers certifying that the goods sold to the petitioners are duty paid. Both the authorities below have not even referred to the invoices and the certificates and have confirmed the show cause notices by merely observing that the documents showing payment of duty has not been produced. It is futile to suggest that the customer who is purchasing goods in the open market should secure documents establishing actual payment of excise duty from the vendor. In my judgment, the orders passed by the two authorities below are clearly illegal and cannot be sustained and the petitioners are entitled to the relief.

6. Accordingly, petition succeeds and the rule is made absolute in terms of prayer (a). There will be no order as to costs. The bonds and the Bank guarantees furnished by the petitioners shall stand discharged and shall be returned to the petitioners.

