
(1980) 10 MAD CK 0028

In the Madras High Court

Case No : Writ Petition No's. 868 and 869 of 1978

Varadalakshmi Mills Limited and Bhajraj Textiles Mills Ltd.

APPELLANT

Vs

The Assistant Collector of Central Excise, The Collector of
Central Excise and Union of India (UOI)

RESPONDENT

Date of Decision : 06-10-1980

Acts Referred:

Citation : (1981) ECR 265

Hon'ble Judges : Mohan, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Mohan, J.—These writ petitions coming on for hearing on this day upon perusing the petition and the respective affidavits filed in support thereof the order of the High Court, dated 17.3.78 and made herein, and the counter and reply affidavits filed herein and the records relating to the order in 1. Order No. 1967/77 dt. 18.5.77 and order No. 970/77 dt. 29.4.77; 2. Order dt. 2.9.76 in CV/18A/ 24-76 (Appeal No. 1585/76) and dt. 30.6.75. in CV/18A/14/74 (Appeal 118/75) 3. Order dt. 6.4.75 in C.No. V/I8A/30-2-75 and dt. 4.5.74 in C.No. V/I8A/30-5-8-73 respectively on the file of the respondents herein and comprised in the return of the said respondents 1 to 3 herein in both the petition to the writ made by the High Court, and upon hearing the arguments of Mr. K.K. Venugopal for M/s. M.N. Krishnamani, K.V. Sridharan and T.K. Rajeswaran Advocates for the petitioner in both the cases, and of Mr. K.N. Balasubramanian Additional Central Government standing Counsel on behalf of the respondents, the Court made the following order:

2. Both these writ petitions can be dealt with under a common order. The only question that arises for consideration in these cases is whether it will be open to the Central Excise authorities to indulge in what is called best of judgment assessment proceedings. In order to highlight this question, the following facts require to be noted:

3. The petitioner in W.P. No. 868 of 1978 is a registered company registered under the Companies Act, 1956 and the petitioner is engaged in the manufacture of cotton yarn. It is assessed to Central Excise in respect of the yarn manufactured by it. Under item 18-A of the First Schedule to the Central Excises and Salt Act, 1944, hereinafter referred to as "the Act", excise duty is levied on cotton twist, yarn and thread of all sorts, sized or unsized, in all forms including Skein, hanks, cops, cones etc. Under the Act and the Rules framed thereunder the duty exisable on cotton yarn of less than NF 51 counts is "nil" and the rate of duty for cotton yarn of 51 to 69 NF counts is 65 paise per kilogram. The petitioner manufactured cotton yarn of NF 50.8 counts and therefore the petitioner is not liable to pay any duty on the yarn so manufactured. A test was conducted on 31.1.1975 and the result of the test was that 908 kgs. of cotton yarn manufactured on that day was found to be 55.8 NF. Concerning this there were checks and re-checks as a result of which the lowest count at which it could be placed was 53.9. NF. Under these circumstances, a show cause notice on 26.6.1975 came to be issued as under:

Whereas it appears that M/s. Varadalakshmi Mills Ltd., Raja-gambeeram, Manamdurai, have contravened Rule 10(1) read with Rule 173J of Central Excise Rules, 1944, inasmuch as they have cleared a quantity of 908 kgs. of cotton yarn plain reel by declaring them as counts 50.8 N.F. under payment of Nil duty, leviable thereon at Rs. 0.65 per kg. and whereas the sample of such cotton yarn taken on 30.12.74 and sent to the Chemical Examiner, Customs House, Madras, was determined by the chemical Examiner vide his letter L.CX/18A/S/75/86/CX. 10677 dated 31.1.75. Therefore, this quantity of 908 kgs. of cotton yarn cleared attracts higher rate of duty at the rate of Rs. 0.65 per kg. as the count determined on the samples of cotton yarn falls in the slab 51 M.F. or more but less than 69 N.F. and the differential duty on the above quantity works out to Rs. 590.20.

Reliance is placed on the chemical Examiner's report under L.CX/18A/S/ 75/86/CX. 10677 dated 31.1.75. (copy already supplied). The said M/s. Varadalakshmi Mills, Manamadurai are hereby required to show cause to the Assistant Collector of Central, Excise, No. 76 Pechiamman Padithurai Madurai-1, why the differential duty of Rs. 590.20 due on the 908 kgs. of cotton yarn cleared of payment of Nil duty than what actually is due should not be demanded from them under Rule 10(2) of Central Excise Rules, 1944, and why the differential duty at the appropriate rate due on 39,770.40 kgs. of cotton yarn left uncleared should not be demanded under Rule 10(2) of the Central Excise Rules, 1944, read with Rule 173J of Central Excise Rules, 1944.

2. M/s. Varadalakshmi Mills, Manamadurai are further directed to produce at the time of showing cause all the evidence upon which, they intend to rely in support of their defence.

3. M/s. Varadalakshmi Mills, Manamadurai should also indicate in the written explanation whether they wish to be heard in person before the case is

adjudicated. If no mention is made about this in their written reply, it shall be construed that they do not desire to be heard in person.

4. If no cause is shown against the action proposed to be taken within ten days of receipt of this notice or they do not appear before the adjudicating officer when the case is posted for hearing the case will be decided ex-parte.

5. The Petitioner preferred his objections and ultimately an order came to be passed after personal hearing that on the yarn declared by the Mills as of NF. 50.8 but found on final test of NF 51 or more but less than NF 69 and totalling to 25081.67 kgs. in quantity as above, the petitioner Mills was called upon to pay the appropriate duty amount on the said quantity. Aggrieved against this order, the matter was taken up to the Appellate Collector. The Appellate Collector did not see any justification to interfere. The revision to the Government of India also failed, It is in these circumstance these writ petitions have been preferred to quash the orders of assessment.

6. The one and only contention urged by Mr; K.K. Venugopal, the learned Counsel for the petitioners is that there is no procedure for best of judgment assessment under the Act, especially when the petitioners have resorted to the self-removal procedure as contemplated under Rule 173-C. Consequently in so far as neither the Act nor the Rules thereunder did provide for best of Judgment assessment, the rulings reported in J.A. Kareem Sait Vs. The Deputy Commercial Tax Officer, Mettupalayam, and Citadel Fine Pharmaceuticals Pvt. Ltd. v. D.R.O. (1973) I M.L.J.99 will clearly come to the aid of the petitioners. Then again as to what is best of judgment assessment can be seen from P. 862 of Kanga and Palkhivala's : the Law and Practice of Income Tax (Seventh Edition vol. I wherein reference is made to C.I.T. v. Laxminarain Badridas 5 ITR 170 and in this case from a mere sample test it can never be contended that the goods manufactured by the petitioners exceeded over and above 51. N.F. It was the duty of the officer concerned or the authority concerned to have taken sample test every now and then and required the petitioners to pay the necessary excise duty. A mere sample taken on one occasion cannot enable him to levy excise duty which would obviously mean that where there are materials so as to enable the authorities to levy, those materials are supplemented by means of best of judgment. This is precisely what is not possible in the circumstances of the case.

6. Mr. K.N. Balasubramaniam, the learned Counsel for the respondents, submits that merely because the petitioners have resorted to self-removal procedure as contemplated under Rule 173-C that cannot tantamount to an assessment. Section 3 is the charging section. Every case listed in Schedule I when manufactured is subject to excise duty. In other words it is the incidence of manufacture that attracts the levy. If the petitioners were earnest nothing prevented them from showing that they would be entitled to the exemption granted under the notification or a lower rate shown in the notification. He cannot on the assumption that he has manufactured a lesser count resort to R-173-C self-removal procedure and expect the authorities to remain silent. The

burden is on the petitioners to prove that they have manufactured yarn of a particular count. In the absence of it, having regard to the random sample test conducted by the department, it is always open to them to hold that the petitioners have produced goods belonging to the particular description. The rulings either under the Income Tax Act or the Sales Tax Act, namely J.A. Kareem Sait Vs. The Deputy Commercial Tax Officer, Mettupalayam, and Citadel Fine Pharmaceuticals Pvt. Ltd. v. D.R.O. 1973 I M.L.J. 99 can have no application whatever, because the law is that the person who claims exemption or seeks lower levy will have to prove the same and it is not for the department to go on conducting test and ultimately conclude as to what exactly is the count of the goods. That certainly is not the purport or the intention of the Act.

7. It is well-settled under law that it is the incidence of the manufacture that attracts excise duty. Section 3 is the charging section. So long as there is manufacture of those goods specified in Schedule 1, on account of such manufacture the goods become subject to excise duty. With this background let me approach the question to be decided, namely whether the assessment in this case partakes the character of best of judgment. It is not denied before me that cotton yarn of the varieties mentioned under tariff item 18-A of the First Schedule is subject to excise duty. Different rates are prescribed for different counts and in the case of count below NF 51 it is not subject to excise duty. If the count is between NF 51 to NF 69, it would be 65 ps. per kg. On the test conducted as seen from the show cause notice 908 kgs. manufactured on a particular day, namely 31.1.1975, was found to be of NF 55.8. There were tests and re-tests as a result of which ultimately the count came to be reduced to 53.9 N.F. The point to be noticed here is that if it is the case of the petitioners that they are entitled to exemption, since the duty for manufacture of yarn of less than 51 NF counts was "nil", it is their duty to prove so as to enable the authorities to hold that it is eligible for exemption. In other words, the onus lies on the petitioners to prove that they qualify for exemption. It is also to be remembered in this connection that straightaway there cannot be a presumption in favour of an exemption. Nor can exemption be claimed as of right. Therefore one sample test would be enough to condemn the petitioner, when no proof whatsoever was forthcoming. This will be so even if the petitioner claims a lower excise duty. As to under what category the goods manufactured by the petitioners come is a matter of proof by them and not for the authorities to determine by taking samples. This will be so albeit there being a provision to make rules u/s 37(xiv) for taking samples and in fact the rules have been made to enable the authorities to take samples. But that is for the purpose of verification. On that score it cannot be said that the onus lies upon the department. The person who seeks exemption or says that the goods answer a particular description will have to let in proof. In the absence of such a proof, the department is well entitled to treat as it likes.

8. The resort to self-removal procedure under Rule 173-C cannot advance the case of the petitioners any further. It is well settled that such a procedure is not

an assessment. Therefore, the contention urged that the assessment is based on best of judgment is untenable. The ruling reported in J.A. Kareem Sait Vs. The Deputy Commercial Tax Officer, Mettupalayam, , is a case which arose under General Sales Tax Act. There the considerations are totally different. Likewise, Citadel Fine Pharmaceuticals Pvt. Ltd. v. D.R.O. 1973 J M.L.J. 99 was a case which arose under the Medicinal and Toilet Preparations (Excise Duties) Act. There, the learned Judges held referring to the decision above cited that in so far as it does not provide for recovery of escaped assessment or provide residuary powers for recovery of sums due to Government the demand in pursuance of the Rules is unsustainable. But, as I observed above, there is no question of any best of judgment assessment arising here. The petitioners having failed to let in the necessary materials so as to enable them to qualify either for exemption or for lower rate of excise duty, cannot be heard to say that the department will have to conduct periodic tests and find out what the petitioners say is true or not. I do not think either the purport or the intent of the Central Excise Act is such. For these reasons, the writ petitions will stand dismissed. However, there will be no order as to costs.